SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-489

CLARK COUNTY, a political subdivision of the State of Nevada,
Petitioner,

vs.

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS and MARVAR ADAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS and MARVAR ADAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

The Petitioner, Clark County, Nevada, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Nevada rendered in this proceeding on June 6, 1973.

OPINION BELOW

The judgment and opinion of the Supreme Court of the State of Nevada appears in the Appendix hereto.

JURISDICTION

The opinion of the Supreme Court of the State of Nevada was rendered on June 6, 1973. A timely petition for rehearing was denied on June 25, 1973, and this petition for certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits the various states from protecting the governmental tortfeasor by requiring that the tort claimant give special notice as a condition precedent to suit.

2. Whether the legislative creation of two classes of tortfeasors, governmental vis-a-vis private, is so arbitrary and irrelevant to the achievement of the state's objective as to constitute a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

3. Whether it is a proper application of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to prohibit legislation by which the state treats victims of torts committed by governmental entities differently than victims of torts committed by private persons.

STATEMENT OF THE CASE

On October 1, 1966, Barbara Adams was admitted to the Southern Nevada Memorial Hospital, a Clark County Hospital, with a chronic kidney infection and hypertensive cardiovascular disease and was discharged on October 14, 1966. She was readmitted and again discharged on November 14, 1966, with the understanding that she would be transferred to Los Angeles, California, for further treatment. Three days later she became ill and died while being transported by ambulance to the hospital. The physician who performed the postmortem examination diagnosed the immediate cause of death to be pulmonary edema and congestion due to probable acute renal insufficiency with uremia and electrolyte imbalance.

A claim on behalf of the minor children of Barbara Adams was filed with the Board of County Commissioners of Clark County, Nevada. However, such filing was not made within the six months' period as required by NRS 244.245 and NRS 244.250 and as required by NRS 41.031 through NRS 41.039[1] which set forth the statutory scheme pursuant to which the State of Nevada waived the pre-existing governmental immunity. After rejection of that claim a complaint was filed by Respondent, Margaret Turner, as legal guardian for the minors, against the Clark County Board of Commissioners, Southern Nevada Memorial Hospital, Jack Staggs, Administrator thereof, Clark County and Dr. H. Q. Adams, for the wrongful death of Barbara Adams.

The cause of action against the Board of County Commissioners in their individual capacities was dismissed by summary judgment and no appeal has been taken from that judgment. The complaint against Clark County was

1. See appendix attached hereto.

dismissed on motion for summary judgment for failure to present a timely claim pursuant to NRS 244.245 and NRS 244.250. Subsequently, the complaint against Jack Staggs was also dismissed. A trial was held on the alleged malpractice of Dr. H. Q. Adams, and the jury returned a defense verdict.

The Respondent appealed these judgments to the Supreme Court of the State of Nevada, where the challenge to the constitutionality of NRS 244.245 and NRS 244.250 was raised for the first time in oral argument. The Nevada Supreme Court, without considering at that time the other issues raised by the appeal, remanded the matter to the district court for a determination of the constitutionality of NRS 244.245 and NRS 244.250.

On remand the district court refused to review the wisdom of a previous decision of the Nevada Supreme Court declaring that the statutes in question were constitutional and therefore returned the case to the Supreme Court of Nevada for disposition of the appeals.

In its opinion rendered on June 6, 1973, that Court refused to consider the appeals with respect to the dismissal of the complaint against Jack Staggs or the defense verdict in favor of Dr. Adams. With respect to the granting of summary judgment in favor of Clark County and its hospital, however, the Court determined that the statutes in question were repugnant to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the dismissal of the complaint against Clark County was therefore reversed and the cause remanded for further proceedings (see appendix hereto). Clark County's petition for rehearing of the matter was denied by the Nevada Supreme Court on June 25, 1973.

REASONS FOR GRANTING THE WRIT

I

The decision below conflicts with the determination of the highest courts of other states as to the proper application of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in relation to statutes which conditionally waive governmental immunity.

Concededly such decision follows the determination of the Supreme Court of the State of Michigan, finding that equal protection is violated by statutes limiting actions against the state. *Reich* v. *State Highway Department*, 386 Mich. 617, 194 N.W.2d 700 (1972). However, identical questions have been presented to the highest courts in California and Illinois, and in both states statutes limiting claims against governmental tortfeasors were found not to be violative of the Equal Protection Clause. *Tammen* v. *County of San Diego*, 58 Cal. Rptr. 249, 426 P. 2d 753 (1967); *Housewright* v. *City of LaHarpe*, 51 Ill. 2d 357, 282 N.E.2d 437 (1972). See also *Hutchinson* v. *Board of Trustees of University of Alabama*, 288 Ala. 20, 256 So. 2d 281 (1971); *Krause* v. *State*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972), app. dis. 41 U.S.L.W. 3329, reh. denied 41 U.S.L.W. 3410 (1973).

Hence a serious conflict of authority upon an important constitutional question is presented. A grant of certiorari should therefore issue from the United States Supreme Court in order that this question be finally resolved and the proliferation of divergent constitutional interpretations be prevented.

II

The decision below decides a substantial federal question in a way contrary to the applicable decisions of the United States Supreme Court.

Mr. Chief Justice Warren, speaking for the Court in *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961), aptly stated the application of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to state statutes:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The decision below cites no "suspect" classification[2] or any deprivation of a fundamental constitutional right[3] which would extinguish the traditional presumption of

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2. See e.g., *Gomez* v. *Perez*, 93 S.Ct. 872 (1973) (illegitimacy); *Graham* v. *Richardson*, 403 U.S. 365 (alienage); *Griffin* v. *Illinois*, 351 U.S. 12 (indigency); *Brown* v. *Board of Education*, 347 U.S. 483 (race); *Oyama* v. *California*, 332 U.S. 633 (national origin).

3. See e.g., *Police Dept. of City of Chicago* v. *Mosley*, 408 U.S. 92 (free speech); *Shapiro* v. *Thompson*, 394 U.S. 618 (freedom of interstate travel); *Williams* v. *Rhodes*, 393 U.S. 23 (freedom of association); *Skinner* v. *Oklahoma, ex rel. Williamson*, 316 U.S. 535 ("liberty" conditionally protected by Due Process Clause of Fourteenth Amendment).

validity accorded a duly enacted state law. In fact, the decision below offers no basis upon which to find claim and notice statutes "arbitrary" other than the Court's determination that, "Within our present scheme of government, claim statutes serve no real beneficial use [citation omitted] but they are indeed a trap for the unwary." *Turner* v. *Staggs*, No. 6770 (Nev. Sup. Ct., June 6, 1973). Petitioner respectfully submits that these are wholly inadequate reasons upon which to find that the Equal Protection Clause has been offended.

The statutes overturned below are clearly the product of a comprehensive plan devised by the Nevada Legislature to provide Petitioner with sufficient time effectively to investigate, defend and allocate funds for actions brought against it. Moreover, they provide the basis from which Petitioner may administratively settle tort claims, thereby reducing the load of an over-burdened judiciary.

The decision below thus takes a new and unchartered direction in the application of the Equal Protection Clause to state statutes, a course of action which is clearly condemned in the recent case of *San Antonio Independent School District* v. *Rodriguez*, 93 S.Ct. 1278 (1973).

A grant of certiorari is therefore justified in order that the United States Supreme Court may review the indiscriminate departure which the decision below has taken with regard to the applicability of the Equal Protection Clause of the Fourteenth Amendment and to bring the decision below within the scope of standards heretofore promulgated by the United States Supreme Court.

III

The decision below poses a significant constitutional issue of great public concern, the ramifications of which will repeatedly present themselves to the courts unless a conclusive judgment is rendered by the United States Supreme Court.

Because of the extensive geographic and official activity of state and local governments, it is imperative that notice of tort claims be brought expeditiously before their respective governing bodies. Frequently, the filing of such notice constitutes the sole means by which governing officials may receive actual notice of a tort claim and affords the first opportunity for the governmental entity to marshal its evidence.

Problems resulting from the filing of claims too remote in time, such as those involving investigation, procurement of witnesses and budgeting, are thus greatly magnified for the governmental tortfeasor as opposed to its private counterpart. By nullifying those statutes which insure timely notice of a claim, the decision below severely reduces the effectiveness of the state and its political subdivisions to defend tort actions.

More importantly, however, the constitutional rationale employed below draws into serious question the constitutionality of a panoply of related statutes aimed at limiting actions against the state and its political subdivisions. Should private and governmental tortfeasors be unconditionally placed on equal footing, as determined by the Court below, statutes setting recovery limits, prohibiting punitive damages or exempting from liability actions by the state militia would, for the same reason, necessarily be found to be repugnant to the Equal Protection Clause of the Fourteenth Amendment.

The drastic consequences of the above are readily apparent. Should the decision below remain unchecked, nullification of the entire statutory scheme of limiting suits against the state or its political subdivisions would seem constitutionally mandatory. The burdens thus imposed ultimately will be visited upon the citizen. Increased taxes and expanded governmental bureaucracy are the foreseeable results.

Nor is Petitioner alone in this respect. No fewer than eleven states have enacted tort claim statutes similar to those struck down below. Application of the Equal Protection Clause of the Fourteenth Amendment in the manner of the decision below will generate a multiplicity of suits, which will ultimately compel a decisive ruling from the nation's Supreme Court.

A grant of certiorari is thus mandated to finally resolve this important constitutional issue which materially bears upon a broad range of governmental functions.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Nevada.

Respectfully submitted,

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August 31, 1973.

APPENDIX

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV

Section 1. **Citizenship; privileges and immunities; due process; equal protection.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEVADA REVISED STATUTES, CHAPTER 244

244.245 Condition precedent to suit against county for claim.

1. No person shall sue a county in any case for any demand, unless he shall first present his claim or demand to the board of county commissioners and the county auditor for allowance and approval, and if they fail or refuse to allow the same, or some part thereof, the person feeling aggrieved may sue the county.

2. If the party suing recover in the action more than the board allowed, or offered to allow, the board and the county auditor shall allow the amount of the judgment and costs as a just claim against the county. If the party suing shall not recover more than the board and the county auditor shall have offered to allow him, then costs shall be recovered against him by the county, and may be deducted from the demand.

244.250 Unaudited claims to be presented within 6 months.

1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.

2. No claim or account against any county shall be audited, allowed or paid by the board of county commissioners, or any other officer of the county, unless the provisions of subsection 1 are strictly complied with.

NEVADA REVISED STATUTES, CHAPTER 41

41.031 Waiver by state, its agencies and political subdivisions of immunity from liability and action; actions; State of Nevada as defendant; service of summons. The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against individuals and corporations, except as otherwise provided in NRS 41.032 to 41.038, inclusive, provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive, or the limitations of NRS 41.010. The State of Nevada further waives the immunity from liability and action of all political subdivisions of the state, and their liability shall be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.038, inclusive, provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive. An action may be brought under this section against the State of Nevada, any agency of the state, or any political subdivision of the state. In an action against the state or any agency of the state, the State of Nevada shall be named as defendant, and the summons shall be served upon the secretary of state.

41.032 Conditions and limitations on actions: Employees' acts or omissions. No action may be brought under NRS 41.031 or against the employee which is:

1. Based upon an act or omission of an employee of the state or any of its agencies or political subdivisions, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, provided such statute or regulation has not been declared invalid by a court of competent jurisdiction; or

2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any employee of any of these, whether or not the discretion involved is abused.

41.033 Conditions and limitations on actions: Failure to inspect, discover. No action may be brought under NRS 41.031 or against the employee which is based upon:

1. Failure to inspect any building, structure or vehicle, or to inspect the construction of any street, public highway or other public work to determine any hazards, deficiencies or other matters, whether or not there is a duty to inspect;

2. Failure to discover such hazard, deficiency or other matter, whether or not an inspection is made.

41.0335 Conditions and limitations on actions: Acts, omissions of sheriffs' deputies, police officers.

1. No action may be brought against:

(a) Any sheriff which is based solely upon any act or omission of a deputy; or

(b) A chief of a police department which is based solely upon any act or omission of an officer of such department.

2. Nothing contained in this section shall be construed:

(a) To limit the authority of the state or a political subdivision or a public corporation of the state to bring an action on any bond or insurance policy provided pursuant to law for or on behalf of any person who may be aggrieved or wronged.

(b) To limit or abridge the jurisdiction of any court to render judgment upon any such bond or insurance policy for the benefit of any person so aggrieved or wronged.

41.035 Limitation on award for damages in action sounding in tort.

1. No award for damages in an action sounding in tort brought under NRS 41.031 may exceed the sum of $25,000 to or for the benefit of any claimant. No such award may include any amount as exemplary or punitive damages or as interest prior to judgment.

2. The limitations of subsection 1 upon the amount and nature of damages which may be awarded apply also to any action sounding in tort and arising from any recreational activity or recreational use of land or water which is brought against:

(a) Any public or quasi-municipal corporation organized under the laws of this state.

(b) Any person with respect to any land or water leased or otherwise made available by such person to any public agency.

(c) Any Indian tribe, band or community whether or not a fee is charged for such activity or use. The provisions

of this paragraph shall not impair or modify any immunity from liability or action existing on February 26, 1968, or arising after February 26, 1968, in favor of any Indian tribe, band or community.

The legislature declares that the purpose of this subsection is to effectuate the public policy of the State of Nevada by encouraging the recreational use of land, lakes, reservoirs and other waters owned or controlled by any public or quasi-municipal agency or corporation of this state, wherever such land or water may be situated.

41.036 Conditions, limitations on actions against state, counties, cities, unincorporated towns, other political subdivisions.

1. No action shall be brought under NRS 41.031 against a county without complying with the requirements of NRS 244.245 to 244.255, inclusive, or against a city without complying with the requirements of NRS 268.020, or against an unincorporated town without complying with the provisions of NRS 269.085, or against the state or any agency or other political subdivision of the state without complying with the requirements of subsection 2 or 3 of this section.

2. Every claim against the state arising out of contract shall be presented in accordance with the provisions of NRS 353.085 or 353.090, and every claim for refund in accordance with the provisions of NRS 353.110 to 353.120, inclusive. Every other claim against the state or any of its agencies shall be presented to the ex officio clerk of the state board of examiners within 6 months from the time the cause of action accrues. He shall within 10 days refer each such claim to the appropriate state agency, office or officer for investigation and report of findings to the board. No action may be brought unless the board refuses to approve or fails within 90 days to act upon the claim.

3. Every claim against any other political subdivision of the state shall be presented, within 6 months from the time the cause of action accrues, to the governing body of that political subdivision. No action may be brought unless the governing body refuses to approve or fails within 90 days to act upon the claim.

41.037 Administrative settlement of claims. Upon receiving the report of findings as provided in subsection 2 of NRS 41.036, the state board of examiners may allow and approve any claim against the state or any of its agencies arising under NRS 41.031 to the extent of $1,000. Upon approval of any claim by the state board of examiners, the state controller shall draw his warrant for the payment thereof, and the state treasurer shall pay the same from the reserve for statutory contingency fund. The governing body of any political subdivision whose authority to allow and approve claims is not otherwise fixed by statute may allow and approve any claim against that subdivision arising under NRS 41.031 to the extent of $1,000 and pay it from any funds appropriated or lawfully available for such purpose.

41.038 Insurance of state, political subdivisions, officers, employees against liability.

1. The state and any political subdivision may:

(a) Insure itself against any liability arising under NRS 41.031.

(b) Insure any of its officers or employees against tort liability resulting from an act or omission in the scope of his employment.

(c) Insure against the expense of defending a claim against itself whether or not liability exists on such claim.

2. Any school district may insure any peace officer, requested to attend any school function, against tort liability resulting from an act or omission in the scope of his employment while attending such function.

41.039 Filing of valid claim against political subdivision condition precedent to commencement of action against employee, officer. An action which is based on the conduct of any employee or appointed or elected officer of a political subdivision of the State of Nevada while in the course of his employment or in the performance of his official duties may not be filed against such employee or officer, prior to the filing of the complaint in such action, a valid claim has been filed, pursuant to NRS 41.031 to 41.038, inclusive, against the political subdivision for which such employee or officer was authorized to act.

CASE No. A 50218

DEPT. No. 6

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA KAY HOLLINS, MARVER ADAMS,

Plaintiff,

-vs-

ROBERT BASKIN, DARWIN LAMB, WILLIAM BRIARE, LOU LaPORTA, JAMES RYAN, County Commissioners of Clark County, et al.,

Defendants.

DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed January 13, 1971)

It appearing that there are no genuine issues of fact or law as to the possible liability of Robert Baskin, Darwin Lamb, William Briare, Lou LaPorta, and James Ryan, in their individual capacities, defendants' motion for summary judgment is granted as to these defendants.

As to defendants JACK STAGGS and CLARK COUNTY, NEVADA, defendants' motion for summary judgment is denied.

DATED this 13th day of January, 1971.

/s/ Howard W. Babcock
District Judge

CASE No. A 50218

DEPT. No. 6

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF CLARK

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS, and MARVAR ADAMS,
Plaintiff,

-vs-

ROBERT BASKIN, DARWIN LAMB, WILLIAM BRIARE, LOU LA PORTA, JAMES RYAN, County Commissioners of Clark County, SOUTHERN NEVADA MEMORIAL HOSPITAL, JACK STAGGS, Administrator thereof, DR. H. Q. ADAMS, et al., and CLARK COUNTY,
Defendants.

DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

(Filed August 6, 1971)

On January 13, 1971, this Court entered an order granting summary judgment in favor of defendants Robert Baskin, Darwin Lamb, William Briare, Lou La Porta and James Ryan in their individual capacities. Summary judgment was denied as to defendants Jack Staggs and Clark County.

Pursuant to motion of defendant Clark County, and good cause appearing, on July 26, 1971, this Court granted leave to defendant Clark County for a rehearing on its motion for summary judgment. The basis of the motion for summary judgment is failure on the part of the plaintiff

herein to file a *timely* claim with the Board of County Commissioners pursuant to NRS 244.245 and NRS 244.250.

It is the law of this state that presentation of a claim to the board of county commissioners within 6 months from the time such claim becomes due and payable is a *condition precedent* to an action against a county. *Barney* v. *Clark County*, 80 Nev. 104, 389 P.2d 392 (1964).

There are no genuine issues of material fact to be determined. It is undisputed that no claim relating to this cause was filed with the board of county commissioners until approximately 13 months after the claim arose.

A condition precedent to an action against the county in this matter being unfulfilled, no such action may be maintained. Clark County is entitled to judgment as a matter of law.

That there has been a previous mistrial of this cause does not affect this judgment. In legal effect, a mistrial is equivalent to no trial at all. 58 C.J.S. 834. Accordingly, it is

ORDERED, that defendant Clark County's motion for summary judgment be, and it hereby is, granted.

DATED this 6th day of August, 1971.

/s/ Howard W. Babcock
District Judge

CASE No. A 50218

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF CLARK

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS, and MARVAR ADAMS,
Plaintiff,

v.

ROBERT BASKIN, DARWIN LAMB, WILLIAM BRIARE, LOU LA PORTA, JAMES RYAN, County Commissioners of Clark County, SOUTHERN NEVADA MEMORIAL HOSPITAL, JACK STAGGS, Administrator thereof, DR. H. Q. ADAMS, et al., and CLARK COUNTY,
Defendants.

JUDGMENT OF DISMISSAL

(Filed August 25, 1971)

The Motion of Defendant JACK STAGGS for a dismissal pursuant to Rule 41(b), Nevada Rules of Civil Procedure, having been made and heard on the 19th day of August, 1971, the parties and their counsel being present, and the Court having heard argument of counsel, and good cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED, that the complaint of the Plaintiff be and the same is hereby dismissed with prejudice, as to the Defendant JACK STAGGS.

DATED this 25th day of August, 1971.

/s/ Joseph S. Pavlikowski
District Judge

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Chartered
By /s/ Harry M. Reid
Attorneys for Defendant, Jack Staggs
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Las Vegas, Nevada

CASE No. A 50218

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF CLARK

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA KAY HOLLINS, MARVAR ADAMS,
Plaintiffs,

vs.

ROBERT BASKIN, DARWIN LAMB, WILLIAM BRIARE, LOU LA PORTA, JAMES RYAN, County Commissioners of Clark County, et al.,
Defendants.

JUDGMENT

(Filed August 25, 1971)

This action came on for trial before the Court and a jury, Honorable Joseph S. Pavlikowski, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the Plaintiffs take nothing, that the action be dismissed on the merits, and that the Defendant H. Q. Adams, M.D. recover of Margaret Turner, as Legal Guardian of Lionel Eugene Hollins, Yolanda Kay Hollins and Marver Adams, Plaintiffs, his costs of action.

DATED at Las Vegas, Nevada, this 25th day of August, 1971.

Loretta Bowman
Clerk of Court
By /s/ Lucille Bunyard

/s/ James F. Pico
Attorney for Defendant H. Q. Adams, M.D.
324 South Third Street
Las Vegas, Nevada

IN THE SUPREME COURT OF THE
STATE OF NEVADA

No. 6770

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS, and MARVAR ADAMS,
Appellants,

vs.

JACK STAGGS, DR. H. Q. ADAMS and CLARK COUNTY,
Respondents.

ORDER

(Filed August 4, 1972)

The court being of the opinion that the constitutionality of the claim statute involved herein should be decided; and the subject not having been raised in the trial court; it is

ORDERED that the case is remanded to the Honorable Joe Pavlikowski, Judge of the Eighth Judicial District Court, so he may establish an appropriate briefing schedule and render his determination of that question.

/s/ Zenoff, C. J.
/s/ Batjer, J.
/s/ Mowbray, J.
/s/ Thompson, J.
/s/ Gunderson, J.

CASE No. A 50218

DEPT. No. 6

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF CLARK

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS, and MARVAR ADAMS,
Plaintiffs,

-vs-

JACK STAGGS, DR. H. Q. ADAMS and CLARK COUNTY,
Defendants.

ORDER

(Filed March 30, 1973)

The Nevada Supreme Court remanded the case herein (Supreme Court Case No. 6770) to this Court for a determination of the "constitutionality of the claims statute involved herein." The issue was set down for hearing before this Court. Upon the conclusion of that hearing, the matter was taken under advisement.

This Court has expended a considerable amount of time exploring the ramifications of the issue tendered in this case. After careful consideration of all the factors involved, this Court concludes that it cannot give accommodation to the order of the Nevada Supreme Court.

That order is unclear as to whether this Court is to review *Barney* v. *Clark County*, 80 Nev. 104, 389 P.2d 392 (1964) alone, or whether the broader issue of constitutionality *per se* is involved. In either event, it is not the

function of this Court to either affirm or disaffirm previous decisions of the Nevada Supreme Court. *McKay* v. *Industrial Commission*, 103 Ariz. 191, 438 P.2d 757 (1968). Such would be the effect of any decision rendered by this Court regarding the constitutionality of the claims statute involved herein. Therefore, it is

ORDERED, that the Record on Appeal and the Exhibits heretofore filed, and those briefs filed subsequent to the return of the case to this Court, be returned to the Clerk of the Nevada Supreme Court.

DATED this 30th day of March, 1973.

/s/ Howard W. Babcock
District Judge

89 Nev., Advance Opinion 78

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS and MARVAR ADAMS, Appellant, *v.* JACK STAGGS, DR. H. Q. ADAMS and CLARK COUNTY, Respondents.

No. 6770

June 6, 1973

Appeal from summary judgment, judgment of dismissal and judgment entered pursuant to a jury verdict. Eighth Judicial District Court, Clark County; Joseph S. Pavlikowski, and Howard W. Babcock, Judges.

Affirmed in part; reversed and remanded in part.

THOMPSON, C. J., and MOWBRAY, J., dissented in part.

Charles L. Kellar, of Las Vegas, for Appellant.

Beckley, DeLanoy & Jemison, of Las Vegas, for Respondents Jack Staggs and Clark County.

James F. Pico, of Las Vegas, for Respondent Dr. H. Q. Adams.

OPINION

By the Court, BATJER, J.:

On October 1, 1966, Barbara Adams was admitted to the Southern Nevada Memorial Hospital with a chronic kidney infection and hypertensive cardiovascular disease, and she was discharged on October 14, 1966. She was readmitted and again discharged November 14, 1966, with the understanding that she would be transferred to Los Angeles, California, for further treatment. Three days later she became ill and died while being transported by ambulance to the hospital. James Y. Clarke, M.D., who performed the postmortem examination, diagnosed the immediate cause of death to be pulmonary edema and congestion due to probable acute renal insufficiency with uremia and electrolyte imbalance.

A claim was filed on behalf of the minor children of Barbara Adams with the Board of County Commissioners of Clark County, Nevada, on November 2, 1967. After rejection of the claim a complaint was filed on December 21, 1967, by Margaret Turner, as legal guardian for the minors[1] against the Clark County Board of Commissioners,

1. In her answer to interrogatories subscribed and sworn to on February 23, 1968, and filed in this action on February 25, 1968, Margaret Turner alleges that she was appointed the legal guardian of the minors by the Eighth Judicial District Court; however, this court finds nothing in the record before it to verify that allegation.

Southern Nevada Memorial Hospital,[2] Jack Staggs, Administrator thereof, Clark County and Dr. H. Q. Adams, for the wrongful death of Barbara Adams.

The cause of action against the board of county commissioners in their individual capacity was dismissed by summary judgment dated January 13, 1970, and no appeal has been taken from that judgment. The complaint against Clark County was dismissed on motion for summary judgment on August 6, 1971, for failure to present a timely claim pursuant to NRS 244.245 and NRS 244.250.[3] See also, NRS 41.031 and NRS 41.036. On August 25, 1971, the complaint against Jack Staggs was dismissed pursuant to NRCP 41(b). A trial was held on the alleged malpractice of Dr. H. Q. Adams and the jury returned a defense verdict.

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2. This court has held that county hospitals, established pursuant to statutory authority [NRS 450.010 et seq.], are without legal entity, and thus not subject to suit for tort. Bloom v. So. Nev. Hospital, 70 Nev. 533, 275 P.2d 885 (1954); McKay v. Washoe General Hospital, 55 Nev. 336, 33 P.2d 755 (1934). Thus, the dismissal of Southern Nevada Memorial Hospital from the suit appears to have been mandated by this court's prior decisions.

3. NRS 244.245: "1. No person shall sue a county in any case for any demand, unless he shall first present his claim or demand to the board of county commissioners and the county auditor for allowance and approval, and if they fail or refuse to allow the same, or some part thereof, the person feeling aggrieved may sue the county.

"2. If the party suing recover in the action more than the board allowed, or offered to allow, the board and the county auditor shall allow the amount of the judgment and costs as a just claim against the county. If the party suing shall not recover more than the board and the county auditor shall have offered to allow him, then the costs shall be recovered against him by the county, and may be deducted from the demand."

NRS 244.250: "1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.

"2. No claim or account against any county shall be audited, allowed or paid by the board of county commissioners, or any other officer of the county, unless the provisions of subsection 1 are strictly complied with."

In this appeal it is contended that the district court erred (1) in granting summary judgment in favor of Clark County and its hospital; (2) in dismissing the complaint agianst Jack Staggs as administrator of Southern Nevada Memorial Hospital;[4] and (3) in giving certain instructions to the jury.

1. We cannot consider issues 2 and 3 because we have not been favored with a transcript of the proceedings in the district court, nor has the appellant submitted a settled and approved statement of the evidence or proceedings. NRCP 75(n).

2. We direct our attention to the summary judgment. The claim against Clark County was not filed until 13 months had elapsed after the death of Barbara Adams. NRS 244.250 requires that a claim against a county must be filed within 6 months after a cause of action arises.

In Barney v. County of Clark, 80 Nev. 104, 389 P.2d 392 (1964), this court held that the timely filing of a claim was a condition precedent to the commencement of an action against a county. *Barney* relied upon the reasoning in Artukovich v. Astendorf, 131 P.2d 831 (Cal. 1942). Artukovich in turn relied in part on the principle that neither the state nor any of its political subdivisions may be sued in the absence of specific statutory permission. In 1956 the State of Nevada, acting through its legislature, waived its immunity from liability and action and consented to have its liability determined in accordance with the same rules of law as are applied to civil actions against individuals and corporations. Stats. of Nev., 1965, ch. 505,

4. In Hughey v. Washoe County, 73 Nev. 22, 306 P.2d 1115 (1957), this court held that a county is the party legally responsible for the obligations of a county hospital. Under the doctrine of respondeat superior, it would appear that dismissal of the complaint against Jack Staggs, Administrator of the Southern Nevada Memorial Hospital, was proper.

p. 1413, codified as NRS 41.031. Furthermore the enactment placed all political subdivisions in a similar position. NRS 41.031.[5]

The requirement of giving notice presupposes the existence of an individual capable of giving it. McCrary v. City of Odessa, 482 S.W.2d 151 (Tex. 1972). To hold otherwise would be disregard reality. Cf. Walgreen Co. v. Industrial Commission, 153 N.E. 831 (Ill. 1926); Lineberry v. Town of Mebane, 13 S.E.2d 429 (N.C. 1941). NRS 244.245 contains no provision for the filing of a claim by anyone other than the claimant. At the time of their mother's death the minor children were between the ages of 5 and 13 years. In many jurisdictions children of tender years, because they are powerless to act, have been excused from compliance with notice provisions. Simpson v. City of Abilene, 388 S.W.2d 760 (Tex.Civ.App. 1965), (7 years old). See also, City of Barnesville v. Powell, 183 S.E.2d 55 (Ga.App. 1971), (4 years old); McDonald v. City of Spring Valley, 120 N.E. 476 (Ill. 1918), (7 years old); Lazich v. Belanger, 105 P.2d 738 (Mont. 1940), (7 years old); Murphy v. Village of Ft. Edward, 107 N.E. 716 (N.Y. 1915), (5 years old); Webster v. City of Charlotte, 22 S.E.2d

5. NRS 41.31: "The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against individuals and corporations, except as otherwise proved in NRS 41.032 to 41.038, inclusive, provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive, or the limitations of NRS 41.010. *The State* of Nevada further *waives the immunity from liability and action of all political subdivisions of the state,* and their liability shall be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.036, inclusive, provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive. *An action may be brought* under this section *against* the State of Nevada, any agency of the state, or *any political subdivision of the state.* In an action against the state or any agency of the state, the State of Nevada shall be named as defendant, and the summons shall be served upon the secretary of state." [Emphasis added.]

900 (N.C. 1942), (8 years old); 18 E. McQuillin, The Law of Municipal Corporations § 53.159 (3rd rev. ed. 1963).

We could conclude that minority alone will excuse compliance with the notice requirements of NRS 244.245 and NRS 244.250 (City of Houston v. Bergstrom, 468 S.W. 2d 588 (Tex.Civ.App. 1971); McCrary v. City of Odessa, supra; Grubaugh v. City of St. Johns, 180 N.W.2d 778 (Mich. 1970)) and dispose of this case upon the ground that the notice requirements of our claim statutes violate the rights of these minors to due process guaranteed by the Fourteenth Amendment of the United States Constitution. However, we believe that the notice of claim requirements found in NRS 244.245 and NRS 244.250 as applied to governmental torts deny equal protection guaranteed by the United States Constitution.[6]

Within our present scheme of government, claim statutes serve no real beneficial use (Grubaugh v. City of St. Johns, supra) but they are indeed a trap for the unwary. NRS 41.038(1). If we follow *Barney*, the minor's cause of action will be barred. They will be precluded from enforcing a liability created by statute for their benefit. Such construction of NRS 244.245 creates invidious discrimination and amounts to a denial of due process and equal protection of the law.

The court in *Artukovich* claims to have been following the "great weight of authority," and that may have been true in 1942, but since then, many jurisdictions have limited or abandoned the doctrine of sovereign immunity, either by legislative enactments or judicial decisions. Likewise,

6. The question of constitutionality of the claim statute was not properly raised before this court, and had not been ruled upon below. After the question was urged in oral argument we remanded the case to the trial court for a decision on that issue. The briefs filed on remand did not convince the lower court that Barney v. County of Clark, supra, need be reviewed as to that point. We deem otherwise.

claim statutes have been found to violate the equal protection provision of the Fourteenth Amendment of the United States Constitution and have been declared unconstitutional. Reich v. State Highway Department, 194 N.W.2d 700 (Mich. 1972); Friedman v. Farmington Township School District, 198 N.W.2d 785 (Mich.App. 1972); Crook v. Patterson, 201 N.W.2d 676 (Mich.App. 1972).

The stated object of NRS 41.031 is to waive the immunity of governmental units and agencies from liability for injuries caused by their negligent conduct, thus putting them on an equal footing with private tort-feasors. However, the notice provisions of NRS 244.245 and NRS 244.250 have the effect of arbitrarily dividing all tort-feasors into classes of tort-feasors: (1) private tort-feasors to whom no notice of claim is owed and (2) governmental tort-feasors to whom notice is owed.

In Reich v. State Highway Dept., supra, the Michigan Supreme Court said: "This diverse treatment of members of a class along the lines of governmental or private tort-feasors bears no reasonable relationship under today's circumstances to the recognized purpose of the act. It constitutes an arbitrary and unreasonable variance in the treatment of both portions of one natural class and is, therefore, barred by the constitutional guarantees of equal protection.

"Just as the notice requirement by its operation divides the natural class of negligent tort-feasors, so too the natural class of victims of negligent conduct is also arbitrarily split into two subclasses; victims of governmental negligence who must meet requirement, and victims of private negligence who are subject to no such requirement." 194 N.W.2d at 702.

Contrary to the mandate of Art. 8, § 5 of the Nevada Constitution[7] and the intention of the legislature to place victims of negligent conduct on equal footing (NRS 41.031), failure to give the 6 month statutory notice arbitrarily bars the victims of governmental tort while the victims of private tort suffer no such bar.

Such arbitrary treatment clearly violates the equal protection guarantees of the United States Constitution. See Art. 1, § 2, Nevada Constitution.

The statutory provisions of this state which provide that no person shall sue a governmental entity of this state for a demand arising out of governmental tort unless they first present a claim within 6 months from the time such tort occurred are void and of no effect.

The judgment of the district court dismissing the complaint against Clark County is reversed and the cause is remanded for further proceedings.

The judgment dismissing the complaint against Jack Staggs and the judgment entered in favor of Dr. H. Q. Adams, pursuant to a jury verdict, are affirmed.

GUNDERSON, J., concurs.

ZENOFF, J., concurring:

I agree with Justices Batjer and Gunderson that the questioned statute is unconstitutional. I add, however, my additional thoughts for I believe that we can consider this case and reach the same result for the further reasons

7. In Lincoln County v. Luning, 133 U.S. 529, 531 (1890), the High Court, specifically referring to Art. 8, § 5, of the Nevada Constitution, held: "[T]hat this section is not to be limited to private corporations is evident not alone from the generality of its language and from the title of the article, but also from several sections therein in which municipal corporations are expressly named."

stated. For the purpose of these stated reasons I respectfully recite the facts in my own manner in order to provide the posture which will be explained.

A complaint was filed December 21, 1967 against the Clark County Commissioners, Southern Nevada Memorial Hospital, Jack Staggs, Administrator thereof, and Dr. H. Q. Adams, for the wrongful death of one Barbara Adams, mother of the real minor plaintiffs by their legal guardian.

Barbara Adams was admitted to the hospital on October 1, 1966 with chronic kidney infection and hypertensive cardiovascular disease; she was discharged on October 14, 1966. A second time she was admitted; she was discharged November 14, 1966 in an improved condition with the understanding that she would be transferred to Los Angeles for further treatment. Three days later she became ill and died while being transported by ambulance to the hospital. The postmortem examination by Dr. Clarke attributed the immediate cause of death to be pulmonary edema and congestion due to probable acute renal insufficiency with uremia and electrolyte imbalance. Barbara was pronounced dead on arrival at the hospital on November 17, 1966.

A claim was filed on behalf of the minor children of Barbara with the appropriate county board on November 2, 1967. After rejection, a civil action against the respondents and others was commenced on December 21, 1967.

The claim against the county commissioners in their individual capacity was dismissed by summary judgment dated January 13, 1970 and the action against Clark County was dismissed on motion for summary judgment on August 6, 1971 for failure to present a timely claim pursuant to

NRS 244.245 and NRS 244.250.[1] On August 25, 1971, a dismissal pursuant to NRCP 41(b) was entered as to Jack Staggs. A trial was had as to the alleged malpractice of Dr. H. Q. Adams wherein the jury returned a defense verdict.

Three main issues were raised for my consideration.[2]

1. Did the court err in granting summary judgment as to Clark County and its hospital?

2. Did the court err in dismissing the claim against Jack Staggs as Administrator of Nevada Southern Memorial Hospital?

3. Did the court err in giving certain instructions to the jury?

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1. 244.245 Condition precedent to suit against county for claim.

1. No person shall sue a county in any case for any demand, unless he shall first present his claim or demand to the board of county commissioners and the county auditor for allowance and approval, and if they fail or refuse to allow the same, or some part thereof, the person feeling aggrieved may sue the county.

2. If the party suing recover in the action more than the board allowed, or offered to allow, the board and the county auditor shall allow the amount of the judgment and costs as a just claim against the county. If the party suing shall not recover more than the board and the county auditor shall have offered to allow him, then costs shall be recovered against him by the county, and may be deducted from the demand.

244.250 Unaudited claims to be presented within 6 months.

1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.

2. No claim or account against any county shall be audited, allowed or paid by the board of county commissioners, or any other officer of the county, unless the provisions of subsection 1 are strictly complied with.

2. The question of the constitutionality of the claim statute was not properly raised before this court, and had not been ruled upon below. We therefore remanded the case to the trial court for a decision on that issue. The briefs filed on remand did not convince the lower court that Barney v. County of Clark, infra, need be reviewed as to that point.

We have no transcript presented to us, thus I cannot consider Issues 2 and 3. The central issue now is directed to the first point.

1. I glean from this record that the deceased was black, sick and impoverished when she died leaving three children in their early minority. The claim against the county and the hospital was not filed for 13 months after her death. NRS 244.250 requires that a claim against a county must be filed within 6 months and under Barney v. County of Clark, 80 Nev. 104, 389 P.2d 392 (1964), a claim must be filed as a condition precedent to the commencement of an action against the county. That case was founded upon Artukovich v. Astendorf, 131 P.2d 831 (Cal. 1942), which marked by a spirited division of the California Supreme Court (4-3) affirmed the established weight of authority that an action against a public entity cannot be filed even by a minor unless the claim statute, if there be one, is first observed.

This case, however, poses a different problem. A claim was filed but not within the statutory 6 months. No reason is given for the failure to file within the statutory period. It is, however, contended that the statutory 6-month period was tolled during the children's minority by reason of NRS 11.250 which provides that if a person is entitled to bring an action other than for the recovery of real property, the time within which the cause of action must be commenced is tolled if that person is within the age of 21 years. This court has adopted the rule expressed in Artukovich v. Astendorf, supra, and I therefore feel compelled to maintain the continuity established by the respected Supreme Court of California. That court later established in Williams v. Los Angeles Metropolitan Transit Auth., 440 P.2d 497 (Cal. 1968), that where the filing of a claim in advance of suit is required, that re-

quirement is suspended during the period of minority if the action is "mentioned" in the limitation statute as one the person could bring. It is so mentioned in Nevada's statutes, NRS 41.036(3)[3] and NRS 11.190(5)(b).[4]

In Williams v. Los Angeles Metropolitan Transit Auth., supra, the plaintiff filed the required claim within the prescribed time but failed to file his action against the public entity within the 6 months required after rejection of the claim. I accept, by analogy, the holding in Williams v. Los Angeles Metropolitan Transit Auth., supra, since Califorina's tolling statute during minority is the same as ours.

2. I am not disturbed by the language of Barney v. County of Clark, supra, which emphasizes *timely* filing since the question of timeliness was not an issue in that case any more than in Kelleher v. Ephrata School District, 355 P.2d 989 (Wash. 1960), cited therein. The point involved in both cases was whether a claim must be filed at all. Timeliness was not the question.

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3. 41.036(3):

3. Every claim against any other political subdivision of the state shall be presented, within 6 months from the time the cause of action accrues, to the governing body of that political subdivision. No action may be brought unless the governing body refuses to approve or fails within 90 days to act upon the claim.

4. 11.190(5)(b): Periods of limitations prescribed. Actions other than those for the recovery of real property, unless further limited by NRS 11.205 or by or pursuant to the Uniform Commercial Code, can only be commenced as follows:

. . .

5. Within 1 year:

. . .

(b) Actions or claims against a county, incorporated city, town or other political subdivision of the state which have been rejected by the board of county commissioners, city council or other governing body, as the case may be, after the first rejection thereof by such board, city council or other governing body, or the expiration of the time limited for failure to act by subsection 3 of NRS 41.036.

3. Nor am I concerned with the fine-line distinction of whether the claim statute is a statute of limitation or a procedural roadblock as a condition precedent to suit. That question was considered in Myers v. Stevenson, 270 P.2d 885, 889 (Cal.App. 1954), and discarded as not being controlling as to the merits of the case. The trend is to construe statutes in such manner as to effectuate the long-recognized principle that children are to be protected during their minority from the destruction of their rights by the running of the statutes of limitation. Williams v. Los Angeles Metropolitan Transit Auth., supra; Los Angeles City School District v. Superior Court, 88 Cal.Rptr. 286 (Cal.App. 1970). The majority will argue that the Williams case, supra, does not apply, that there is a difference between a statute of limitation and a condition precedent to suit. The minors here are entitled to the benefits of the tolling statute. Whether the claim statute be called a statute of limitations or a condition precedent is of no moment. A review of other authorities reflects the foretold positive trend against the rigidity of the claim statutes, particularly as they affect the rights of minors.

THOMPSON, C. J., with whom MOWBRAY, J., agrees, dissenting in part:

I would affirm the summary judgment for Clark County and, therefore, dissent from that aspect of the Court's opinion.

1. The timely filing of claims with the Board of County Commissioners is a precondition to the existence of a cause of action against the County. Barney v. County of Clark, 80 Nev. 104, 389 P.2d 392 (1964). The minority of the children of the decedent does not excuse noncompliance nor extend the time for compliance, since proper claims could have been timely filed by their legal repre-

sentative. Although it is true that the period of disability of a minor shall not be part of the time limited for the commencement of an action, NRS 11.250; Parker v. Chrysler Motors Corp., 88 Nev. 560, 502 P.2d 111 (1972), that provision applies only when considering the affirmative defense of the statute of limitations, and does not bear upon the duty of minor claimants through their legal representative, to timely file their claims as a condition precedent to the existence of a cause of action. As noted in Barney v. County of Clark, supra, "[w]e are not concerned therefore with a statute in the nature of a statute of limitations; rather we are concerned with the performance of a necessary condition precedent to suit." Id. at 106.

2. The majority opinion voids all statutes precluding suit against a governmental entity for any tort demand unless a claim is first presented. This sweeping declaration nullified NRS 41.036, NRS 244.245 to 244.255, NRS 268.020 and, perhaps, others. Barney v. County of Clark, supra, and Hart v. City of Las Vegas, 73 Nev. 29, 307 P.2d 617 (1957), are silently overruled. Moreover, it renders meaningless, so far as a claim statute is concerned, a substantial body of case law dealing with timeliness and substantial compliance with the intendment of the statute. Derouen v. City of Reno, 87 Nev. 606, 491 P.2d 989 (1971); Kaminski v. Woodbury, 85 Nev. 667, 462 P.2d 45 (1969); City of Boulder City v. Miles, 85 Nev. 46, 449 P.2d 1003 (1969); Rogers v. State, 85 Nev. 361, 455 P.2d 172 (1969); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); City of Reno v. Fields, 69 Nev. 300, 250 P.2d 140 (1952), and Las Vegas v. Schultz, 59 Nev. 1, 83 P.2d 1040 (1938). These cases preserved the integrity of the legislative scheme and at the same time honored the rights of claimants who had met the underlying purposes of the statute. Their rights were not denied for technical or insubstantial

reasons. Whenever a sensible explanation was offered for failing to comply with a claim statute requirement, that explanation was accepted.

It is not per se bad for a court to set aside statutes and ignore case precedent. It is, however, conduct calling for extreme caution. Solid reasons must exist. I perceive no such reasons in the matter at hand. The majority of this Court find that claim statutes violate the command of the Equal Protection Clause of the Federal Constitution. With due deference, I suggest that the Equal Protection Clause does not bear upon the matter.

The legislature has a wide discretion to enact laws which affect some groups of citizens differently than others. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. McGowan v. United States, 366 U.S. 420 (1961). The purpose of a claim statute is to enable the governmental agency to make an early investigation of the claim, of the claimant, and to marshal evidence promptly at a time when it is possible to do so. City of Reno v. Fields, 69 Nev. 300, 250 P.2d 140 (1952); Brown v. Board of Trustees, Etc., 104 N.E.2d 866 (N.Y. 1952). This purpose surely is reasonable and not an arbitrary exercise of legislative power. I cannot find it to be irrational nonsense.

All persons injured through the negligence of the state or its political subdivisions have been granted the right to bring suit (except where immunity is retained) and this right is granted equally and without discrimination on any basis whatsoever. NRS 41.031; State v. Silva, 86 Nev. 911, 478 P.2d 591 (1970). This is equality under the same conditions and among persons similarly situated. Boyne v. State ex rel. Dickerson, 80 Nev. 160, 390 P.2d 225 (1964). And, contrary to the view of the majority, the Equal Protection Clause does not require equal treatment of private

persons and the State. Tustin Heights Ass'n. v. Board of Supervisors, 339 P.2d 914 (Cal. App. 1959). This is the thrust of Derouen v. City of Reno, 87 Nev. 606, 491 P.2d 989 (1971), where we upheld a city claim statute against the contention that a city should not be treated differently than a private corporation. It also is the teaching of State v. Silva, supra, where we held that the State could limit recovery to $25,000 for each claimant without violating the concept of equal protection. Are these recent decisions no longer viable? Have they also been cast aside sub silentio? If it is constitutionally permissible for the State to limit recovery (State v. Silva, supra) how can it be constitutionally impermissible for the State to require that a claim be filed?

As I read the majority opinion it voids the claim statutes insofar as they apply to governmental torts. Are these statutes still operative otherwise? This wholesale slaughter of a complete statutory scheme and of case precedent, both old and recent, is conduct unsuited to the function of this Court. Respectfully, I dissent.

IN THE SUPREME COURT OF THE
STATE OF NEVADA

CLERK'S CERTIFICATE

(Filed July 12, 1973)

STATE OF NEVADA, ss.

I, C. R. Davenport, the duly appointed and qualified Clerk of the Supreme Court of said State of Nevada, do hereby certify that the following is a full, true and correct copy of the judgment in the matter of Turner v. Staggs, No. 6770.

Judge Howard Babcock

APPEAL FROM JUDGMENT

This matter having been heretofore submitted, and the Court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, to the effect: "The judgment of the district court dismissing the complaint against Clark County is reversed and the cause is remanded for further proceedings.

The judgment dismissing the complaint against Jack Staggs and the judgment entered in favor of Dr. H. Q. Adams, pursuant to a jury verdict, are affirmed."

Opinion of the Court by Batjer, J., concurred in by Gunderson and Zenoff, JJ.; Thompson, C.J., and Mowbray, J., dissenting in part by separate opinion.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this 6th day of July, 1973.

C. R. Davenport
Clerk of Supreme Court of the
State of Nevada
By /s/ Judith McCulloch
Deputy

Judgment, as quoted above, entered this 6th day of June, 1973.

ON PETITION FOR REHEARING

Upon consideration of the petition for rehearing filed herein, the Court having again reviewed and being fully advised in the premises and the law, it is now ordered, adjudged and decreed, to the effect: "Respondents' petition for rehearing is denied . . ."

Judgment, as quoted above, entered this 25th day of June, 1973.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this 6th day of July, 1973

C. R. Davenport
Clerk of Supreme Court of the
State of Nevada
By /s/ Judith McCulloch
Deputy

COURT, U. S.
OCT 9 1973
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-489

CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, *Petitioner*,

v.

MARGARET TURNER, AS LEGAL GUARDIAN OF LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS AND MARVAR ADAMS, *Respondents*.

BRIEF OF THE STATES OF NEVADA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, KENTUCKY, NEBRASKA, NORTH CAROLINA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, UTAH, AND WASHINGTON, AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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SPO, CARSON CITY, NEVADA, 1973

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STATUTES:

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MISCELLANEOUS:

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Jaffee, *Suits against Governments and Officers: Sovereign Immunity*, 77 Har.L.Rev., p. 1 ..... 7, 8, 13
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73–489

CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, *Petitioner,*

v.

MARGARET TURNER, AS LEGAL GUARDIAN OF LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS AND MARVAR ADAMS, *Respondents.*

BRIEF OF THE STATES OF NEVADA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, KENTUCKY, NEBRASKA, NORTH CAROLINA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, UTAH, AND WASHINGTON, AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

STATEMENT OF THE CASE

In 1965, the Nevada Legislature waived Nevada's and its political subdivisions' immunity from suit. Nevada Revised Statute 41.031 et. seq. The Legislature further prescribed that a claimant could not bring suit unless a timely notice of the claim was filed with the State or political subdivision.

Thereafter, the Supreme Court of Nevada consistently upheld these notice of claim requirements and developed a substantial

body of case law dealing with timeliness and substantial compliance with the legislative scheme of waiver of immunity from suit. (See Appendix A, page 28.)

Only eighteen months prior to its decision in *Turner v. Staggs*, 89 Nev. ....., Advance Opinion 78, the Supreme Court of Nevada unanimously upheld, in *Derouen v. City of Reno*, 87 Nev. 606, 491 P.2d 989, that there was no constitutional restriction upon the Legislature's power to restrict a right of action. Against this background, *Turner v. Staggs* came before the Court. The fabric of predictability of the law woven by these prior and recent decisions came apart in *Turner v. Staggs*. The decision in *Turner v. Staggs* is set forth in Appendix A.

The decision of the Supreme Court of Nevada voided as a denial of equal protection Nevada's statutes requiring timely presentment of claim as precondition to suing the state or its political subdivisions.

The State of Nevada was not a party to the proceedings in the Nevada Courts.[1] Consequently, Nevada had no knowledge of the pendency before the Supreme Court of Nevada of the constitutionality of the notice requirements of the claim statutes.

The constitutional challenge did not arise at trial but came up during oral argument on appeal. Indeed, as the State reads the opinion, the Nevada Supreme Court *sua sponte* questioned the constitutionality of the claim statutes. The case was remanded to the District Judge for determining their constitutionality. The District Judge ruled that the Nevada Supreme Court's upholding of the validity of the claims statutes in recent decisions was precedent and obligatory upon him. The Supreme Court thereafter rendered its decision without further oral argument.

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[1]The case was not an action for declaratory judgment challenging the constitutionality of a state statute in which the attorney general is served.

Although not a party, the State of Nevada nonetheless moved the Nevada Supreme Court for leave to file a petition in intervention in the nature of a petition for rehearing.[2] Nevada's motion and Clark County's petition for rehearing were denied.

INTEREST OF AMICI CURIAE

The State of Nevada is in the uncommon, perhaps unparalled, position of having one of its laws regulating a vital area of the State's relations with its citizens struck down without ever having had an opportunity to present the State's views and arguments on behalf of the people to the Supreme Court of Nevada.

In short, the people of Nevada have been foreclosed access to their own state court of last resort. They now look to the Supreme Court of the United States for the opportunity to be heard as *amicus curiae* on the constitutionality of the notice requirements of the state claims statute.

Another more important interest of Nevada and its thirteen sister states[3] appearing as *amici curiae* is the fundamental question of whether a state legislature may prescribe conditions precedent to suit against the state or its political subdivisions. Underlying this inquiry is the consideration of the court-created rule of governmental immunity from tort liability vis-a-vis the legislatively-created rule of government immunity from suit as they bear on the principle of separation of powers.

The concern of *amici curiae* further extends to the recent trend of more and more state legislatures waiving the state's immunity from suit, and the effect an unbridled decision such as

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[2]Precedent for such a motion is *Sun Oil Co. v. Burford,* 130 F.2d 10, 19, reversed on other grounds. 319 U.S. 315.

[3]Other states have expressed interest in filing briefs on the merits as *amicus curiae* if certiorari is granted.

Turner v. Staggs could have thereon. This immunity of the states from suit has now been waived by some eleven States. In so waiving, the legislatures have attached restrictive conditions to be met by a citizen before a cause of action accrues against the state.

The *amici curiae* strongly believe that the accelerated trend of recent waivers of immunity from suit will be slowed, if not reversed altogether, and more likely reinstated by state legislatures, if a State cannot constitutionally classify itself differently for purposes of suit where state treasury liability may be imposed.

Another grave infirmity of the *Turner* decision, and one which the *amici curiae* view with marked apprehension, is the statement of the majority opinion, Appendix A, page 22, that claims statutes serve no beneficial use in our scheme of state government. The implications this view bodes for the separation of powers are, to say the least, disquieting.

ARGUMENT

1.

THE DECISION BELOW VOIDING A STATE STATUTE AS A DENIAL OF EQUAL PROTECTION SHOULD BE BASED ON APPLICABLE DECISIONS OF THIS COURT.

The Supreme Court of Nevada grounds its decision in *Turner v. Staggs* upon a denial of the equal protection of the laws under the Fourteenth Amendment. This basis of the majority's decision raises the more fundamental question of whether a state may, without denying equal protection of the law, classify itself different from its citizens when waiving the state's immunity from suit.

Significantly, the majority proceeds to answer this pervasive

question without citing or reviewing one decision of the Supreme Court of the United States in support of its holding that the statute offends the Equal Protection Clause.

Unquestionably, whenever a court, particularly a state court of last resort, has before it an equal protection challenge to a statute arising under the Constitution of the United States, the court should turn for guidance to the pronouncements of the United States Supreme Court on the constitutional provision in question.

The majority opinion not only does not consider or apply either the test of "strict judicial scrutiny" or "does the statute rationally further some legitimate state interest", *San Antonio Indep. Sch. Dist. v. Rodriguez*, 1278, 1287, 1288 and 1300, the majority opinion does not apply any test or judicial criteria. Instead, the majority relied on two Michigan decisions, culminating in *Reich v. State Highway Dept.*, 194 N.W.2d, 700. The *Reich* case is illustrative of the court abrogating the court-created rule of government immunity from tort liability.

The Constitution of Nevada, as do the constitutions of most states, authorizes the Legislature to provide for suit against the state.[4] The waiver of immunity from suit is to be by law of general application to everyone similarly situated with respect to the state.

The scope of the Equal Protection Clause forbids a legislature to select any person and impose discrimination not cast upon others similarly situated. *Atchison, T. & S. F. Rwy. Co. v. Matthews*, 174 U.S. 96. And it is well settled that a state may classify persons and objects for the purpose of legislation. Mr.

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[4]"Provision may be made by general law for bringing suit against the state as to all liabilities originating after the adoption of this Constitution." Article IV, Section 22.

Justice Stewart, concurring with the majority in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 93 S.Ct. 1278, stated:

> Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the Equal Protection Clause, rather, is simply to measure the validity of *classifications* created by state laws.
>
> There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes. [Page 1310.]

Nowhere does the majority in *Turner v. Staggs* undertake a review of the reasons for the Legislature's classification of a claimant's right to sue private tort-feasors differently from his right to sue governmental tort-feasors.

Nor does the majority approach the matter from the standpoint of whether the Legislature can prescribe different treatment for the accrual of, and bringing suit upon, a cause of action when the government is the tort-feasor.

Nor does the majority examine whether minors have rights under the United States Constitution different from adult citizens. The Constitution of the United States does not give to minors special rights beyond others. *Vance v. Vance*, 108 U.S. 514, 521. And yet the majority simply concludes that it is a denial of equal protection to treat minors differently from others.

The majority opinion also fails to distinguish between the time when a cause of action accrues against the state and the time within which suit must be brought. This distinction is not academic as it is the timely notice of the claim by which the right to sue accrues, and a cause of action is held to accrue only at the time a suit may be maintained thereon. *Friedman v. United States*, 310 F.2d 381, 385–386, cert. denied, 373 U.S. 932.

Once a cause of action accrues, the period of limitation begins to run. *Missouri Pacific Rwy. v. Austin*, 292 F.2d 415, and the period is tolled by reason of a disability such as minority. Nevada Revised Statute 11.250 provides for tolling of limitation of action during minority.

Thus, for the purpose of when a cause of action accrues against Nevada or its political subdivisions, minors are not treated, nor classified, any differently at all. All citizens of Nevada are in the same class, whether minors or adults.

But assuming, *arguendo*, that the Nevada Legislature has classified minors differently for purposes of accruing the right to sue the state, then the majority should have considered if the classification is so discriminatory or invidious as to deny minors equal protection of the laws. But, instead, the majority concludes that notice of claim requirements constitute a denial of equal protection, not to minors only, but as applied to every potential claimant.

II.

ONLY THE LEGISLATURE MAY PRESCRIBE THE CONDITIONS ON WHICH STATE MAY BE SUED.

The provisions of state constitutions authorizing suit against the state recognize a fundamental attribute of a State's sovereignty that it cannot be sued without consent of the state. The doubts expressed in *Chisholm v. Georgia*, 2 U.S. (Dall.) 419, as to whether a State of the United States was sovereign so as to enjoy immunity from suit were laid to rest by adoption of the Eleventh Amendment. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Har.L.Rev., pp. 19–20. These constitutional provisions have generally been held not to be self-executing and no suit may be maintained until the legislature provides therefor. 81 C.J.S., States, Section 214-a, p. 1304.

The Nevada Legislature has, by enacting NRS 41.031 et. seq., provided by law for suit against the State and has required the giving of notice of claims by potential suitors. The majority opinion does not share the Legislature's view that the claim statutes are needful and would read into the State Constitution the "Supreme Court may by decision provide for suit against the State." This view of the majority nullifies a power delegated to the Legislature by the people—a power to decide for the people what is best or is wise and expedient policy. An earlier Supreme Court of Nevada observed in *Hess v. Pegg*, 7 Nev. 23, 31, the solution to impolitic or unwise laws lies "in the more careful selection of the members of that branch of state government to which they have . . . . vested the Legislative authority of this state."

To be sure, the majority in *Turner v. Staggs* may have abrogated the notice of claim requirements from a failure to distinguish governmental immunity from tort liability with sovereign immunity from suit although neither doctrine is discussed. The two doctrines are distinct and unrelated. *Apfelbacher v. State*, 152 N.W. 144; *Holytz v. City of Milwaukee*, 115 N.W.2d 618; *Muskoph v. Corning Hosp. Dist.*, 11 Cal.Rptr., 89, 359 P.2d, 457, 460; *Jaffe*, Har.L.Rev. pp. 3–4, *supra*.

The doctrine of governmental immunity from tort liability had its genesis in the court-created doctrine that "the King could do no wrong" and since it was created by the court, it could be abolished by the Court: *Pierce v. Yakima Valley Mem. Hosp. Assn.*, 260 P.2d, 765, *Muskoph v. Corning Hosp. Dist.*, *supra*, *Holytz v. City of Milwaukee*, *supra*, *McAndrews v. Mularchuk*, 162 A.2d 820, 832.

The doctrine of sovereign immunity from suit exists in Nevada

and in most states not as a creation of courts, but as a constitutional principle chosen by the people and subject to change only by amendment adopted by the people.

Acquiescense in the majority's viewpoint that it decides what is beneficial and best serves the people effectively enjoins the Nevada Legislature from discharging its constitutional authority to prescribe by general law for suits against the state. And it would avail the State nothing if the Legislature were again to pass another notice statute as long as the Supreme Court of Nevada persists in the premise that it can prescribe the terms and conditions upon which the State may be sued.

III.

THE EFFECT OF THE DECISION BELOW RENDERS PROVISION OF NEVADA CONSTITUTION INOPERATIVE AS CONTRAVENING THE EQUAL PROTECTION CLAUSE.

In waiving sovereign immunity from suit, the Nevada Legislature acted pursuant to constitutional authority to do so set forth in Article IV, Section 22. Consistent with this mandate, the Legislature enacted a general law applicable to everyone having a claim against the State. No exceptions or restrictions pertaining to special or favored persons or classes were enacted or prescribed.

The Legislature did set the State and its political subdivisions apart from private tort-feasors by prescribing procedural steps to be followed precedent to claimants' right to maintain a suit against the State.

One procedural step is the requirement of timely filing a notice of the particulars of a claim with the State or political subdivision.

It is this requirement the majority in *Turner v. Staggs* voided as a denial of equal protection.

Other restrictions on the right to sue the State were imposed by the Legislature such as limiting the liability of the State to $25,000.00 per claimant, prohibiting awards of punitive damages or interest, establishing exceptions to liability when acting in a discretionary capacity or acting pursuant to statute or regulations and others.

The majority's statement in *Turner v. Staggs*, that claims statutes serve no beneficial use within the scheme of state government is at war with the keystone of representative government in America, i.e., the principle of separation of powers. The statement, if left standing, nullifies Section 22 of Article IV of the Nevada Constitution and serves as precedent for nullification of similar constitutional provisions of other states providing that the Legislature may authorize suit against the State.

If the majority is correct in its holding that one restriction is a denial of equal protection because claimants having claims against private tort-feasors are not similarly restricted, then it is a short step to voiding all conditions precedent which the Legislature deemed necessary to protect the State against financial irresponsibility of unlimited suit against the State. *Turner v. Staggs* sets the stage upon which courts will soon act to invalidate the Legislature's constitutional perogative of providing for suit.

There can be no doubt that Section 22, Article IV, of the Constitution of Nevada has been negated effectively as though it were excised and transferred to the Article enumerating the powers of the judicial department.

Thus, it is the will of the people, not merely as expressed in statute, but as expressed in the organic document of Nevada government, its Constitution, that is set aside.

Whenever a state court boldly assumes the legislative power of deciding the wisdom or expediency of legislation then review by *certiorari* is the only available means of preserving the powers of each of the three branches of government in some semblance of equilibrium. The *amici curiae* earnestly submit that this is a case for review by *certiorari*.

As Justice Brennan, dissenting in *Reich v. State Highway Dept.*, 194 N.W.2d, 700, *supra*, prophetically observed:

> The process of judicial repeal of legislative enactments set in motion with this decision will run as far as judicial caprice will carry it. It will now be the fashion for judges to throw out all differentials in statutes of limitations. * * * There is no limitation, it seems, to the ingenuity of judges who disagree with the legislature. What a pity that the American experiment in self-government has in 200 years fallen upon such bad times. [Page 703.]

Indeed, the *Reich* decision, aside from its being embraced in *Turner v. Staggs*, has been cited by another jurisdiction, *Whitfield v. Roth*, 107 Cal.Rptr. 207. There, the Court heeded Justice Brennan's admonition, saying:

> On the other hand, there is a good deal to be said for the proposition that judicial repeal of legislation through the elastic expedient of the constitutional concept of equal protection of the laws is hazardous. While the executive and legislative branches are directly answerable to the electorate and are thereby prevented from ignoring the doctrine of separation of powers, the judicial branch, particularly at the appellate level, is generally not so restricted. Therefore, the full vitality of the doctrine, as envisaged by the founding fathers, is, to a very great extent, dependent upon the scrupulous and conscientious self-imposed discipline of *judicial restraint*. [See *Reich v. State Highway Dept.*, *supra*, 194 N.W.2d 700, p. 703, dissenting opinion of Brennan, J.]

IV.

THE DECISION BELOW NEEDLESSLY DRAWS INTO QUESTION APPLICATION OF EQUAL PROTECTION CLAUSE TO PROVISION OF STATE CONSTITUTION

The decision in *Turner v. Staggs* exceeds the bounds of judicial restraint which *Whitfield v. Roth, supra*, so aptly discerned and stayed within. The majority states that it could dispose of the case on the grounds rights of a minor were involved and would excuse compliance with the notice requirement. Appendix A, page 25. The Supeme Court of California did stop at this juncture in *Williams v. L.A. Metropolitan Trans. Auth.*, 440 P.2d 497, when it held the six months' limitation period after rejection of a claim was tolled during minority.

However, the Nevada Supreme Court chose not to decide the case on these grounds, but went far beyond the necessities of the case. In so doing, the majority opinion fell into the unaccustomed, and certainly unserving, role of legislating. One is hard put to conclude other than its straying beyond these limits was not inadvertent.

It is also apparent that the majority opinion in *Turner v. Staggs* is an abrupt departure from the historic posture and treatment of constitutional issues by an appellate court.

As noted, the State was not a party to the proceedings, and the question of constitutionality under the equal protection clause was raised by the Court itself. Secondly, after the Court stated it could decide the appeal on more narrow grounds, i.e., the involvement of minor's rights, the Court proceeded anyway to decide the equal protection question.

Next, it did not decide whether minors were denied equal protection but decided all persons, without classification, were

denied equal protection. And finally, the Court voided the statutes without resort whatsoever to the pronouncements of the Supreme Court of the United States in securing the guarantees of equal protection.

Moreover, the majority abandoned decisions of the Supreme Court of Nevada which for one hundred years continually hewed to the mold of *Gibson v. Mason*, 5 Nev. 283–294–295, holding the power to legislate necessarily carried with it the right to determine expediency, wisdom and justice of law, and courts have no power to annul or set aside a statute because of considerations of natural justice, wisdom or expediency.

V.

PRECEDENT OF THE DECISION BELOW WILL BE COUNTER-PRODUCTIVE TO THE TREND OF STATES TO WAIVE THEIR IMMUNITY FROM SUIT.

Each state enjoys immunity from suit except that portion delegated to the national government, and partly returned to it by the Eleventh Amendment.

Some Courts, beginning with *Chisholm v. Georgia, supra*, legal writers, and journals, have criticized the doctrine of state immunity from suit as incompatible with popular sovereignty vis-a-vis a regal sovereignty. Some authorities have questioned whether the doctrine ever really existed at common law except in name only.[5]

These criticisms aside however, the doctrine of state immunity from suit has enjoyed a viable existence in the United States.

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[5]Jaffe, *Suits Against Governments And Officers: Sovereign Immunity*, 77 Har. L. Rev. 1; Mathis, *The Eleventh Amendment: Adoption and Interpretation*. 2 Georgia L. Rev. p. 207–209.

Although in recent times, many state Legislatures have enacted statutes pursuant to state constitution waiving immunity from suit. These waivers are generally conditioned upon measures deemed by the Legislature necessary to limit liability and unlimited financial drain on the state treasury. It cannot be seriously maintained that it is not the perogrative of the Legislature to impose restrictions upon the right to sue the state.

It is well settled that the United States is ordinarily immune from suit and that there is no question of the power of Congress to define the limits of its waiver of sovereign immunity. *Kendall v. United States*, 107 U.S. 123; *United States v. Sherwood*, 312 U.S. 584. *Crown Coat Front Co. v. United States*, 386 U.S. 503, 520.

A decision as the one in question which strips the Legislature of its constitutional perogative on an undemonstrated conflict with the United States Constitution can only be regarded with grave misgivings by those mindful of the delicate balance of powers among the three branches of government.

There can be little doubt that *Turner v. Staggs*, left unchecked, and its progeny sure to follow, will give those states which have not waived their immunity ample reason to pause and reflect upon the consequences of doing so. Prospects of the state treasury being held in no more regard than the pocketbook of any of its citizens is chilling indeed to those states which have conditionally permitted suit. It would not be surprising to find these states taking another look at their previously-supposed enlightened approach of allowing their citizens a remedy, albeit a limited one, when wronged by the state.

CONCLUSION

For the foregoing reasons, we respectfully submit this is a case most providently suited for review by this Court and the petition for *certiorari* should be granted.

Respectfully submitted,

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APPENDIX A

89 Nev., Advance Opinion 78

IN THE SUPEME COURT OF THE STATE OF NEVADA

MARGARET TURNER, AS LEGAL GUARDIAN OF LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS AND MARVAR ADAMS, APPELLANT, *v.* JACK STAGGS, DR. H. Q. ADAMS AND CLARK COUNTY, RESPONDENTS.

No. 6770

June 6, 1973

Appeal from summary judgment, judgment of dismissal and judgment entered pursuant to a jury verdict. Eighth Judicial District Court, Clark County; Joseph S. Pavlikowski, and Howard W. Babcock, Judges.

Affirmed in part; reversed and remanded in part.

THOMPSON, C. J., and MOWBRAY, J., dissented in part.

Charles L. Kellar, of Las Vegas, for Appellant.

Beckley, DeLanoy & Jemison, of Las Vegas, for Respondents Jack Staggs and Clark County.

James F. Pico, of Las Vegas, for Respondent Dr. H. Q. Adams.

OPINION

By the Court, BATJER, J.:

On October 1, 1966, Barbara Adams was admitted to the Southern Nevada Memorial Hospital with a chronic kidney infection and hypertensive cardiovascular disease, and she was discharged on October 14, 1966. She was readmitted and again discharged November 14, 1966, with the understanding that she would be transferred to Los Angeles, California, for further treatment. Three days later she became ill and died while being transported by ambulance to the hospital. James Y. Clarke, M.D.,

who performed the postmortem examination, diagnosed the immediate cause of death to be pulmonary edema and congestion due to probable acute renal insufficiency with uremia and electrolyte imbalance.

A claim was filed on behalf of the minor children of Barbara Adams with the Board of County Commissioners of Clark County, Nevada, on November 2, 1967. After rejection of the claim a complaint was filed on December 21, 1967, by Margaret Turner, as legal guardian for the minors[1] against the Clark County Board of Commissioners, Southern Nevada Memorial Hospital,[2] Jack Staggs, Administrator thereof, Clark County and Dr. H. Q. Adams, for the wrongful death of Barbara Adams.

The cause of action against the board of county commissioners in their individual capacity was dismissed by summary judgment dated January 13, 1970, and no appeal has been taken from that judgment. The complaint against Clark County was dismissed on motion for summary judgment on August 6, 1971, for failure to present a timely claim pursuant to NRS 244.245 and NRS 244.250.[3] See also, NRS 41.031 and NRS

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[1]In her answer to interrogatories subscribed and sworn to on February 23, 1968, and filed in this action on February 25, 1968, Margaret Turner alleges that she was appointed the legal guardian of the minors by the Eighth Judicial District Court; however, this court finds nothing in the record before it to verify that allegation.

[2]This court has held that county hospitals, established pursuant to statutory authority [NRS 450. et seq.], are without legal entity, and thus not subject to suit for tort. Bloom v. So. Nev. Hospital, 70 Nev. 533, 275 P.2d 885 (1954); McKay v. Washoe General Hospital, 55 Nev. 336, 33 P.2d 755 (1934). Thus, the dismissal of Southern Nevada Memorial Hospital from the suit appears to have been mandated by this court's prior decisions.

[3]NRS 244.245: "1. No person shall sue a county in any case for any demand, unless he shall first present his claim or demand to the board of county commissioners and the county auditor for allowance and approval, and if they fail or refuse to allow the same, or some part thereof, the person feeling aggrieved may sue the county.

"2. If the party suing recover in the action more than the board allowed, or offered to allow, the board and the county auditor shall allow the amount of the judgment and costs as a just claim against the county. If the party suing shall not recover more than the board and the county auditor shall have offered to allow him, then costs shall be recovered against him by the county, and may be deducted from the demand."

NRS 244.250: "1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.

"2. No claim or account against any county shall be audited, allowed

41.036. On August 25, 1971, the complaint against Jack Staggs was dismissed pursuant to NRCP 41(b). A trial was held on the alleged malpractice of Dr. H. Q. Adams and the jury returned a defense verdict.

In this appeal it is contended that the district court erred (1) in granting summary judgment in favor of Clark County and its hospital; (2) in dismissing the complaint against Jack Staggs as administrator of Southern Nevada Memorial Hospital;[4] and (3) in giving certain instructions to the jury.

1. We cannot consider issues 2 and 3 because we have not been favored with a transcript of the proceedings in the district court, nor has the appellant submitted a settled and approved statement of the evidence or proceedings. NRCP 75(n).

2. We direct our attention to the summary judgment. The claim against Clark County was not filed until 13 months had elapsed after the death of Barbara Adams. NRS 244.250 requires that a claim against a county must be filed within 6 months after a cause of action arises.

In Barney v. County of Clark, 80 Nev. 104, 389 P.2d 392 (1964), this court held that the timely filing of a claim was a condition precedent to the commencement of an action against a county. *Barney* relied upon the reasoning in Artukovich v. Astendorf, 131 P.2d 831 (Cal. 1942). Artukovich in turn relied in part on the principle that neither the state nor any of its political subdivisions may be sued in the absence of specific statutory permission. In 1965 the State of Nevada, acting through its legislature, waived its immunity from liability and action and consented to have its liability determined in accordance with the same rules of law as are applied to civil actions against individuals and corporations. Stats. of Nev., 1965, ch. 505, p. 1413, codified as NRS 41.031. Furthermore the enactment placed all political subdivisions in a similar position. NRS 41.031.[5]

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or paid by the board of county commissioners, or any other officer of the county, unless the provisions of subsection 1 are strictly complied with."

[4]In Hughey v. Washoe County, 73 Nev. 22, 306 P.2d 1115 (1957), this court held that a county is the party legally responsible for the obligations of a county hospital. Under the doctrine of respondeat superior, it would appear that dismissal of the complaint against Jack Staggs, Administrator of the Southern Nevada Memorial Hospital, was proper.

[5]NRS 41.031: "The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions

The requirement of giving notice presupposes the existence of an individual capable of giving it. McCrary v. City of Odessa, 482 S.W.2d 151 (Tex. 1972). To hold otherwise would be to disregard reality. Cf. Walgreen Co. v. Industrial Commission, 153 N.E. 831 (Ill. 1926); Lineberry v. Town of Mebane, 13 S.E.2d 429 (N.C. 1941). NRS 244.245 contains no provision for the filing of a claim by anyone other than the claimant. At the time of their mother's death the minor children were between the ages of 5 and 13 years. In many jurisdictions children of tender years, because they are powerless to act, have been excused from compliance with notice provisions. Simpson v. City of Abilene, 388 S.W.2d 760 (Tex.Civ. App. 1965), (7 years old). See also, City of Barnesville v. Powell, 183 S.E.2d 55 (Ga.App. 1971), (4 years old); McDonald v. City of Spring Valley, 120 N.E. 476 (Ill. 1918), (7 years old); Lazich v. Belanger, 105 P.2d 738 (Mont. 1940), (7 years old); Murphy v. Village of Ft. Edward, 107 N.E. 716 (N.Y. 1915), (5 years old); Webster v. City of Charlotte, 22 S.E.2d 900 (N.C. 1942), (8 years old); 18 E. McQuillin, The Law of Municipal Corporations § 53.159 (3rd rev. ed. 1963).

We could conclude that minority alone will excuse compliance with the notice requirements of NRS 244.245 and NRS 244.250 (City of Houston v. Bergstrom, 468 S.W.2d 588 (Tex.Civ.App. 1971); McCrary v. City of Odessa, supra; Grubaugh v. City of St. Johns, 180 N.W.2d 778 (Mich. 1970)) and dispose of this case upon the ground that the notice requirements of our claim statutes violate the rights of these minors to due process guaranteed by the Fourteenth Amendment of the United States Constitution. However, we believe that the notice of claim requirements found in NRS 244.245

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against individuals and corporations, except as otherwise proved in NRS 41.032 to 41.038, inclusive, provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive, or the limitations of NRS 41.010. *The State* of Nevada further *waives the immunity from liability and action of all political subdivisions of the state,* and their liability shall be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.036, inclusive, provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive. *An action may be brought* under this section *against* the State of Nevada, any agency of the state, or *any political subdivision of the state.* In an action against the state or any agency of the state, the State of Nevada shall be named as defendant, and the summons shall be served upon the secretary of state." [Emphasis added.]

and NRS 244.250 as applied to governmental torts deny equal protection guaranteed by the United States Constitution.[6]

Within our present scheme of government, claim statutes serve no real beneficial use (Grubaugh v. City of St. Johns, supra) but they are indeed a trap for the unwary. NRS 41.038(1). If we follow *Barney*, the minor's cause of action will be barred. They will be precluded from enforcing a liability created by statute for their benefit. Such construction of NRS 244.245 creates invidious discrimination and amounts to a denial of due process and equal protection of the law.

The court in *Artukovich* claims to have been following the "great weight of authority," and that may have been true in 1942, but since then, many jurisdictions have limited or abandoned the doctrine of sovereign immunity, either by legislative enactments or judicial decisions. Likewise, claim statutes have been found to violate the equal protection provision of the Fourteenth Amendment of the United States Constitution and have been declared unconstitutional. Reich v. State Highway Department, 194 N.W.2d 700 (Mich. 1972); Friedman v. Farmington Township School District, 198 N.W.2d 785 (Mich.App. 1972); Crook v. Patterson, 201 N.W.2d 676 (Mich.App. 1972).

The stated object of NRS 41.031 is to waive the immunity of governmental units and agencies from liability for injuries caused by their negligent conduct, thus putting them on an equal footing with private tort-feasors. However, the notice provisions of NRS 244.245 and NRS 244.250 have the effect of arbitrarily dividing all tort-feasors into classes of tort-feasors: (1) private tort-feasors to whom no notice of claim is owed and (2) governmental tort-feasors to whom notice is owed.

In Reich v. State Highway Dept., supra, the Michigan Supreme Court said: "This diverse treatment of members of a class along the lines of governmental or private tort-feasors bears no reasonable relationship under today's circumstances to the recognized purpose of the act. It constitutes an arbitrary

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[6]The question of constitutionality of the claim statute was not properly raised before this court, and had not been ruled upon below. After the question was urged in oral argument we remanded the case to the trial court for a decision on that issue. The briefs filed on remand did not convince the lower court that Barney v. County of Clark, supra, need be reviewed as to that point. We deem otherwise.

and unreasonable variance in the treatment of both portions of one natural class and is, therefore, barred by the constitutional guarantees of equal protection.

"Just as the notice requirement by its operation divides the natural class of negligent tort-feasors, so too the natural class of victims of negligent conduct is also arbitrarily split into two subclasses; victims of governmental negligence who must meet requirement, and victims of private negligence who are subject to no such requirement." 194 N.W.2d at 702.

Contrary to the mandate of Art. 8, § 5 of the Nevada Constitution[7] and the intention of the legislature to place victims of negligent conduct on equal footing (NRS 41.031), failure to give the 6 month statutory notice arbitrarily bars the victims of governmental tort while the victims of private tort suffer no such bar.

Such arbitrary treatment clearly violates the equal protection guarantees of the United States Constitution. See Art. 1, § 2, Nevada Constitution.

The statutory provisions of this state which provide that no person shall sue a governmental entity of this state for a demand arising out of governmental tort unless they first present a claim within 6 months from the time such tort occurred are void and of no effect.

The judgment of the district court dismissing the complaint against Clark County is reversed and the cause is remanded for further proceedings.

The judgment dismissing the complaint against Jack Staggs and the judgment entered in favor of H. Q. Adams, pursuant to a jury verdict, are affirmed.

GUNDERSON, J., concurs.

ZENOFF, J., concurring:

I agree with Justices Batjer and Gunderson that the questioned statute is unconstitutional. I add, however, my additional thoughts for I believe that we can consider this case and reach the same result for the further reasons stated. For the

[7]In Lincoln County v. Luning, 133 U.S. 529, 531 (1890), the High Court, specifically referring to Art. 8, § 5, of the Nevada Constitution, held: "[T]hat this section is not to be limited to private corporations is evident not alone from the generality of its language and from the title of the article, but also from several sections therein in which municipal corporations are expressly named."

purpose of these stated reasons I respectfully recite the facts in my own manner in order to provide the posture which will be explained.

A complaint was filed December 21, 1967 against the Clark County Commissioners, Southern Nevada Memorial Hospital, Jack Staggs, Administrator thereof, and Dr. H. Q. Adams, for the wrongful death of one Barbara Adams, mother of the real minor plaintiffs by their legal guardian.

Barbara Adams was admitted to the hospital on October 1, 1966 with chronic kidney infection and hypertensive cardiovascular disease; she was discharged on October 14, 1966. A second time she was admitted; she was discharged November 14, 1966 in an improved condition with the understanding that she would be transferred to Los Angeles for further treatment. Three days later she became ill and died while being transported by ambulance to the hospital. The postmortem examination by Dr. Clarke attributed the immediate cause of death to be pulmonary edema and congestion due to probable acute renal insufficiency with uremia and electrolyte imbalance. Barbara was pronounced dead on arrival at the hospital on November 17, 1966.

A claim was filed on behalf of the minor children of Barbara with the appropriate county board on November 2, 1967. After rejection, a civil action against the respondents and others was commenced on December 21, 1967.

The claim against the county commissioners in their individual capacity was dismissed by summary judgment dated January 13, 1970 and the action against Clark County was dismissed on motion for summary judgment on August 6, 1971 for failure to present a timely claim pursuant to NRS 244.245 and NRS 244.250.[1] On August 25, 1971, a dismissal pursuant to NRCP 41(b) was entered as to Jack Staggs. A trial was had

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[1]244.245 Condition precedent to suit against county for claim.

1. No person shall sue a county in any case for any demand, unless he shall first present his claim or demand to the board of county commissioners and the county auditor for allowance and approval, and if they fail or refuse to allow the same, or some part thereof, the person feeling aggrieved may sue the county.

2. If the party suing recover in the action more than the board allowed, or offered to allow, the board and the county auditor shall allow the amount of the judgment and costs as a just claim against the county. If the party suing shall not recover more than the board and the county

as to the alleged malpractice of Dr. H. Q. Adams wherein the jury returned a defense verdict.

Three main issues were raised for my consideration.[2]

1. Did the court err in granting summary judgment as to Clark County and its hospital?

2. Did the court err in dismissing the claim against Jack Staggs as Administrator of Nevada Southern Memorial Hospital?

3. Did the court err in giving certain instructions to the jury?

We have no transcript presented to us, thus I cannot consider Issues 2 and 3. The central issue now is directed to the first point.

1. I glean from this record that the deceased was black, sick and impoverished when she died leaving three children in their early minority. The claim against the county and the hospital was not filed for 13 months after her death. NRS 244.250 requires that a claim against a county must be filed within 6 months and under Barney v. County of Clark, 80 Nev. 104, 389 P.2d 392 (1964), a claim must be filed as a condition precedent to the commencement of an action against the county. That case was founded upon Artukovich v. Astendorf, 131 P.2d 831 (Cal. 1942), which marked by a spirited division of the California Supreme Court (4–3) affirmed the established weight of authority that an action against a public entity cannot be filed even by a minor unless the claim statute, if there be one, is first observed.

This case, however, poses a different problem. A claim was filed but not within the statutory 6 months. No reason is given

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auditor shall have offered to allow him, then costs shall be recovered against him by the county, and may be deducted from the demand.

244.250 Unaudited claims to be presented within 6 months.

1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.

2. No claim or account against any county shall be audited, allowed or paid by the board of county commissioners, or any other officer of the county, unless the provisions of subsection 1 are strictly complied with.

[2]The question of the constitutionality of the claim statute was not properly raised before this court, and had not been ruled upon below. We therefore remanded the case to the trial court for a decision on that issue. The briefs filed on remand did not convince the lower court that Barney v. County of Clark, infra, need be reviewed as to that point.

for the failure to file within the statutory period. It is, however, contended that the statutory 6-month period was tolled during the children's minority by reason of NRS 11.250 which provides that if a person is entitled to bring an action other than for the recovery of real property, the time within which the cause of action must be commenced is tolled if that person is within the age of 21 years. This court has adopted the rule expressed in Artukovich v. Astendorf, supra, and I therefore feel compelled to maintain the continuity established by the respected Supreme Court of California. That court later established, in Williams v. Los Angeles Metropolitan Transit Auth., 440 P.2d 497 (Cal. 1968), that where the filing of a claim in advance of suit is required, that requirement is suspended during the period of minority if the action is "mentioned" in the limitation statute as one the person could bring. It is so mentioned in Nevada's statutes, NRS 41.036(3)[3] and NRS 11.190(5)(b).[4]

In Williams v. Los Angeles Metropolitan Transit Auth., supra, the plaintiff filed the required claim within the prescribed time but failed to file his action against the public entity within the 6 months required after rejection of the claim. I accept, by analogy, the holding in Williams v. Los Angeles Metropolitan Transit Auth., supra, since California's tolling statute during minority is the same as ours.

2. I am not disturbed by the language of Barney v. County of Clark, supra, which emphasizes *timely* filing since the question

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[3]41.036(3):

3. Every claim against any other political subdivision of the state shall be presented, within 6 months from the time the cause of action accrues, to the governing body of that political subdivision. No action may be brought unless the governing body refuses to approve or fails within 90 days to act upon the claim.

[4]11.190(5)(b): Periods of limitations prescribed. Actions other than those for the recovery of real property, unless further limited by NRS 11.205 or by or pursuant to the Uniform Commercial Code, can only be commenced as follows:

. . .

5. Within 1 year:

. . .

(b) Actions or claims against a county, incorporated city, town or other political subdivision of the state which have been rejected by the board of county commissioners, city council or other governing body, as the case may be, after the first rejection thereof by such board, city council or other governing body, or the expiration of the time limited for failure to act by subsection 3 of NRS 41.036.

of timeliness was not an issue in that case any more than in Kelleher v. Ephrata School District, 355 P.2d 989 (Wash. 1960), cited therein. The point involved in both cases was whether a claim must be filed at all. Timeliness was not the question.

3. Nor am I concerned with the fine-line distinction of whether the claim statute is a statute of limitation or a procedural roadblock as a condition precedent to suit. That question was considered in Myers v. Stevenson, 270 P.2d 885, 889 (Cal. App. 1954), and discarded as not being controlling as to the merits of the case. The trend is to construe statutes in such manner as to effectuate the long-recognized principle that children are to be protected during their minority from the destruction of their rights by the running of the statutes of limitation. Williams v. Los Angeles Metropolitan Transit Auth., supra; Los Angeles City School District v. Superior Court, 88 Cal.Rptr. 286 (Cal. App. 1970). The majority will argue that the Williams case, supra, does not apply, that there is a difference between a statute of limitation and a condition precedent to suit. The minors here are entitled to the benefits of the tolling statute. Whether the claim statute be called a statute of limitations or a condition precedent is of no moment. A review of other authorities reflects the foretold positive trend against the rigidity of the claim statutes, particularly as they affect the rights of minors.

THOMPSON, C. J., with whom MOWBRAY, J., agrees, dissenting in part:

I would affirm the summary judgment for Clark County and, therefore, dissent from that aspect of the Court's opinion.

1. The timely filing of claims with the Board of County Commissioners is a precondition to the existence of a cause of action against the County. Barney v. County of Clark, 80 Nev. 104, 389 P.2d 392 (1964). The minority of the children of the decedent does not excuse noncompliance nor extend the time for compliance, since proper claims could have been timely filed by their legal representative. Although it is true that the period of disability of a minor shall not be part of the time limited for the commencement of an action, NRS 11.250; Parker v. Chrysler Motors Corp., 88 Nev. 560, 502 P.2d 111 (1972), that provision applies only when considering the affirmative defense of the statute of limitations, and does not bear upon the duty of minor claimants through their legal representative, to timely file their claims as a condition precedent to the existence of a cause of

action. As noted in Barney v. County of Clark, supra, "[w]e are not concerned therefore with a statute in the nature of a statute of limitations; rather we are concerned with the performance of a necessary condition precedent to suit." Id. at 106.

2. The majority opinion voids all statutes precluding suit against a governmental entity for any tort demand unless a claim is first presented. This sweeping declaration nullified NRS 41.036, NRS 244.245 to 244.255, NRS 268.020 and, perhaps, others. Barney v. County of Clark, supra, and Hart v. City of Las Vegas, 73 Nev. 29, 307 P.2d 617 (1957), are silently overruled. Moreover, it renders meaningless, so far as a claim statute is concerned, a substantial body of case law dealing with timeliness and substantial compliance with the intendment of the statute. Derouen v. City of Reno, 87 Nev. 606, 491 P.2d 989 (1971); Kaminski v. Woodbury, 85 Nev. 667, 462 P.2d 45 (1969); City of Boulder City v. Miles, 85 Nev. 46, 449 P.2d 1003 (1969); Rogers v. State, 85 Nev. 361, 445 P.2d 172 (1969); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); City of Reno v. Fields, 69 Nev. 300, 250 P.2d 140 (1952), and Las Vegas v. Schultz, 59 Nev. 1, 83 P.2d 1040 (1938). These cases preserved the integrity of the legislative scheme and at the same time honored the rights of claimants who had met the underlying purposes of the statute. Their rights were not denied for technical or insubstantial reasons. Whenever a sensible explanation was offered for failing to comply with a claim statute requirement, that explanation was accepted.

It is not per se bad for a court to set aside statutes and ignore case precedent. It is, however, conduct calling for extreme caution. Solid reasons must exist. I perceive no such reasons in the matter at hand. The majority of this Court find that claim statutes violate the command of the Equal Protection Clause of the Federal Constitution. With due deference, I suggest that the Equal Protection Clause does not bear upon the matter.

The legislature has a wide discretion to enact laws which affect some groups of citizens differently than others. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. McGowan v. United States, 366 U.S. 420 (1961). The purpose of a claim statute is to enable the governmental agency to make an early investigation of the claim, of the claimant, and to marshal evidence promptly at a time when it is possible to do so. City of Reno v. Fields, 69 Nev. 300, 250 P.2d 140 (1952); Brown v. Board of Trustees,

Etc., 104 N.E.2d 866 (N.Y. 1952). This purpose surely is reasonable and not an arbitrary exercise of legislative power. I cannot find it to be irrational nonsense.

All persons injured through the negligence of the state or its political subdivisions have been granted the right to bring suit (except where immunity is retained) and this right is granted equally and without discrimination on any basis whatsoever. NRS 41.031; State v. Silva, 86 Nev. 911, 478 P.2d 591 (1970). This is equality under the same conditions and among persons similarly situated. Boyne v. State ex rel. Dickerson, 80 Nev. 160, 390 P.2d 225 (1964). And, contrary to the view of the majority, the Equal Protection Clause does not require equal treatment of private persons and the State. Tustin Heights Ass'n. v. Board of Supervisors, 339 P.2d 914 (Cal.App. 1959). This is the thrust of Derouen v. City of Reno, 87 Nev. 606, 491 P.2d 989 (1971), where we upheld a city claim statute against the contention that a city should not be treated differently than a private corporation. It also is the teaching of State v. Silva, supra, where we held that the State could limit recovery to $25,000 for each claimant without violating the concept of equal protection. Are these recent decisions no longer viable? Have they also been cast aside sub silentio? If it is constitutionally permissible for the State to limit recovery (State v. Silva, supra) how can it be constitutionally impermissible for the State to require that a claim be filed?

As I read the majority opinion it voids the claim statutes insofar as they apply to governmental torts. Are these statutes still operative otherwise? This wholesale slaughter of a complete statutory scheme and of case precedent, both old and recent, is conduct unsuited to the function of this Court. Respectfully, I dissent.

COURT, U. S.
OCT 26 1973
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-489

CLARK COUNTY, a political subdivision of the State of Nevada,
Petitioner,

vs.

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS and MARVAR ADAMS,
Respondent.

PETITIONER'S REPLY MEMORANDUM

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Respondent.

PETITIONER'S REPLY MEMORANDUM

The Respondent, in her opposing brief, makes numerous assertions of fact which are unsupported in the record, immaterial and, perhaps, erroneous. However, since the present posture of this case involves only the question of the jurisdiction of this Court, the same will be disregarded herein, and this Memorandum will address itself only to Respondent's contentions against such jurisdiction.

I

As the record indicates (Petition, A 23), the decision below reversed the dismissal of the complaint against Petitioner and remanded the cause for further proceedings. Respondent contends that such an order is not final and therefore not reviewable by the United States Supreme Court under 28 U.S.C. §1257 (Brief in Opp., p. 5).

Petitioner submits that such a contention is erroneous and entirely ignores recent decisions of the United States Supreme Court which interpret "finality" for the purpose of determining ripeness for review. In a line of cases commencing with *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court has recognized the finality of an order and its ripeness for review *notwithstanding* the fact that further proceedings were ordered by the court below. *Rosenblatt* v. *American Cyanamid Company*, 86 S. Ct. 1 (1965); *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386 (1964); *Mercantile National Bank of Dallas* v. *Langdeau*, 371 U.S. 555 (1963) and *Local No. 438 Construction & Gen. Lab. U.* v. *Curry*, 371 U.S. 542 (1963).

Enunciating the "collateral order doctrine" as it applies to 28 U.S.C. §1291, regarding appeals from final decisions of district courts, this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, supra, at 546 stated:

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the actions, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction." [Citations omitted].

The concept of collaterality of an appeal based on the adjudication of certain rights which are separable from the other issues to be litigated later during a trial on the merits, was applied to the finality rule of 28 U.S.C. §1257 in *Local No. 438 Construction & Gen. Lab. U.* v. *Curry*, supra. The Court's opinion in *Curry* was enlarged and redefined in *Mercantile National Bank at Dallas* v. *Langdeau*, supra, to the effect that the venue determined in that case was final

as a "separate and independent matter, anterior to the merits, and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Id., at 558.

Following the precedent of *Curry* and *Langdeau*, the Court in *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, supra, recognized the finality of a determination on the validity of a state statute in advance of an adjudication of other issues raised by the litigants on cross-petition. The Court in finding the decision below final and reviewable, despite "further proceedings" ordered in that decision, said:

> "The fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' therein on the cross-petition does not render the judgment of the Ohio Supreme Court on the issue here considered and decided non-final or unappealable within the meaning of 28 U.S.C. §1257." [Citations omitted]. Id., note 4 at 389.

In a case comparable to the one at bar, this Court held that an appeal from an order denying appellant's motion to dismiss (which challenged the constitutionality of a state statute) was "final" for purposes of review by the Court under 28 U.S.C. §1257. The Court, drawing upon the factors determining finality in *Curry* and *Langdeau* and comparing them to the instant case, stated:

> "Here, as in *Curry*, there has been: (1) a final assertion of jurisdiction, with no review of that issue possible in the state courts, (2) a threat of serious erosion of national policy (here, the due process right against subjection to excessive state assertions of *in personam* jurisdiction); and (3) a state judgment on an issue anterior to and separable from the merits, and not enmeshed in the factual controversies of the case." *Rosenblatt* v. *American Cyanamid Company*, 86 S. Ct. 1, 3.

Petitioner respectfully submits that the record of the case at bar clearly shows that the decision below, similar to that of *Rosenblatt*, is characteristic of those decisions deemed by this Court to be separable from, and collateral to, a determination on the merits.

Petitioner has no procedural recourse, other than review by the United States Supreme Court, to appeal the nullification by the Nevada Supreme Court of NRS 244.245 and NRS 244.250. As determined by the highest court of the State of Nevada, these statutes are constitutionally infirm and therefore void and of no effect. Such is now the law of the case and the doctrines of *res judicata* and *stare decisis* operate to forever bar the defense provided by NRS 244.245 and NRS 244.250 from being raised against Respondent's claim or any other claim brought against Petitioner in the State of Nevada. Thus, the issues to be determined in the "further proceedings" ordered by the decision below are independent of and collateral to the issue of the constitutionality of the Nevada claim statutes, that issue having been finally and unalterably determined by the highest court of the State.

II

Respondent contends that the decision below rests on adequate non-federal grounds and is therefore non-reviewable by the United States Supreme Court. (Brief in Opp., p. 6).

Petitioner submits that Respondent's brief in support of this contention, through the use of truncated and immaterial quotations, takes such liberties with the decision below that it distorts, if not obscures, the obvious grounds upon which that decision was based.

Respondent fails to cite, nor does the decision contain, any adequate state constitutional grounds upon which the

Nevada claim statutes could have been voided, save the court's mention of Article 8, §5 of the Nevada Constitution in the following:

> "Contrary to the mandate of Art. 8, §5 of the Nevada Constitution and the intention of the legislature to place victims of negligent conduct on equal footing (NRS 41.031), failure to give the 6 month statutory notice arbitrarily bars the victims of governmental tort while the victims of private tort suffer no such bar." (Brief in Opp., p. 6).

Respondent neglects, however, to bring to the attention of this Court the qualifying language immediately following that paragraph, which states:

> "Such arbitrary treatment clearly violates the equal protection guarantees of the United States Constitution. See Art. 1, §2, Nevada Constitution." (Petition, A 23).

Clearly, the above sentence characterizes the statutory notice requirement of NRS 244.245 as repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution and necessarily qualifies the preceding non-federal references accordingly.

At page 6 of the Brief in Opposition, Respondent cites the following portion of the decision below in support of the allegation that adequate non-federal grounds exist for the court's decision.

> "Within our present scheme of government, claim statutes serve no real beneficial use (Grubaugh v. City of St. Johns, supra) but they are indeed a trap for the unwary. NRS 41.038(1). If we follow Barney, the minor's cause of action will be barred. They will be precluded from enforcing a liability created by statute for their benefit."

Again, however, Respondent omits the sentence immediately following, in the same paragraph, which states:

> "Such construction of NRS 244.245 creates invidious discrimination and amounts to a denial of due process and equal protection of the law." (Petition, A 21).

Obviously, this portion omitted by Respondent indicates that the court's refusal to enforce the claim statutes, was based on its determination that such enforcement would deny to the Respondent the guarantees of due process and equal protection of the law mandated by the United States Constitution. Indeed, the deletion of this significant expression in the decision below reveals Respondent's self-serving attempt to obscure the federal grounds of the decision.

Further evidence that the determination below rested firmly upon federal grounds is found in the earlier order of the Nevada Supreme Court to remand this case to the trial court so that the issue of federal constitutionality of the claim statutes could there be determined and properly raised before the Nevada Supreme Court on appeal. This is stated in the decision below as follows:

> "The question of constitutionality of the claim statute was not properly raised before this court, and had not been ruled upon below. After the question was urged in oral argument we remanded the case to the trial court for a decision on that issue. The briefs filed on remand did not convince the lower court that Barney v. County of Clark, supra, need be reviewed as to that point. We deem otherwise." (Petition, note 6 at A 21).

Petitioner submits that such a statement clearly indicates the intention of the Supreme Court of Nevada to specifically determine the constitutionality of the claim statutes in the decision below with reference to the United States Constitution.

Finally and conclusively, the decision below expressly declares the equal protection clause of the Fourteenth Amendment of the United States Constitution to be the authority upon which the decision is based and the grounds upon which Nevada's claim statutes, NRS 244.245 and NRS 244.250, were nullified.

> "We *could* conclude that minority alone will excuse compliance with the notice requirements of NRS 244.245 and NRS 244.250 (City of Houston v. Bergstrom, 468 S.W.2d 588 (Tex.Civ.App. 1971); McCrary v. City of Odessa, supra; Grubaugh v. City of St. Johns, 180 N.W.2d 778 (Mich. 1970)) and dispose of this case upon the ground that the notice requirements of our claim statutes violate the rights of these minors to due process guaranteed by the Fourteenth Amendment of the United States Constitution. *However, we believe that the notice of claim requirements found in NRS 224.245 and NRS 244.250 as applied to governmental torts deny equal protection guaranteed by the United States Constitution.*" (Emphasis added) (Petition, A 21).

CONCLUSION

In light of the authority cited and arguments tendered hereinabove, Petitioner submits that Respondent's Brief in Opposition is plainly without merit. Respondent has ignored relevant decisions of the United States Supreme Court which have determined that opinions such as the one below, are final for purposes of review pursuant to 28 U.S.C. §1257. Further, Respondent's contention to the contrary notwithstanding, even a superficial reading of the decision below reveals that the court based its judgment exclusively upon federal constitutional grounds. Petitioner

therefore submits that the jurisdiction of the United States Supreme Court is clearly warranted in this action and prays that this Court grant a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Nevada.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-489

CLARK COUNTY, a political subdivision of the State of Nevada,

Petitioner,

vs.

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS and MARVAR ADAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF CITY OF LAS VEGAS AS AMICUS CURIAE

CARL E. LOVELL, JR.
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400 East Stewart Avenue
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QUESTIONS PRESENTED

1. Whether it is a proper application of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to prohibit legislation by which the State treats victims of torts committed by governmental entities differently than victims of torts committed by private persons.

2. Whether the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits the various states from protecting the governmental tort tortfeasor by requiring that the tort claimant gives special notice as a condition precedent to suit.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF CITY OF LAS VEGAS AS AMICUS CURIAE

By leave of this Court, the CITY OF LAS VEGAS, NEVADA, a Municipal Corporation, files this brief as amicus curiae.

JURISDICTION

The opinion of the Supreme Court of the State of Nevada was rendered on June 6, 1973. A timely petition for rehearing was denied on June 25, 1973, and the petition for certiorari was filed by CLARK COUNTY within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

INTEREST OF THE AMICUS CURIAE

The amicus curiae, CITY OF LAS VEGAS, NEVADA, has an interest in this case in that it is subject to the provisions of NRS 268.020, which is the statute applicable to claims against the City of Las Vegas, Nevada, and is comparable to NRS 244. 245 and 244.250 and the decision of the Nevada Supreme Court raises an issue of great importance. If left undisturbed, the ramifications of the decision will repeatedly present themselves to the Courts of the State of Nevada. Further, the decision of the Nevada Supreme Court is in direct conflict with recent decisions of the Supreme Courts of other states and with the decisions of this Honorable Court.

The CITY OF LAS VEGAS will not take up the "merits", except to adopt the views expressed by Petitioner, CLARK COUNTY.

REASONS FOR GRANTING THE WRIT

I

The decision below decided a question contrary to the applicable decisions of United States Supreme Court.

The decision of the Nevada Supreme Court stands squarely in conflict with that of this Court as expressed in the case of McGowan v. Maryland, 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, 399 (1961), wherein this Court, on page 1105, stated that:

> "The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the

[1] See appendix attached hereto.

Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See Kotch v. Board of River Port Pilot Com'rs, 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093; Metropolitan Casualty Ins. Co. of New York v. Brownell, 294 U.S. 580, 55 S.Ct. 538, 79 L.Ed. 1070; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369; Atchison, T. & S.F.R.Co. v. Matthews, 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909." (Emphasis added.)

To allow a Court decision to stand which is an abrogation of the legislative intent allows said Court under the guise of judicial interpretation to avoid the plain, certain and mandatory provisions of a statute. Birmingham v. Weston, (1937) 233 Ala 563, 172 So 643, 109 ALR 970; Professional Firefighters, Inc. v. City of Los Angeles, 32 Cal.Rptr. 830, 384 P.2d 158.

Although the case of State of Arizona v. Wadsworth, 109 Ariz 59, 505 P.2d 230, involves the classification of drugs, it is analogous to the problem in this matter inasmuch as it points out that a classification must be unreasonable in order to be struck down by the Court and be a denial of equal protection. The Arizona Supreme Court relied upon this Court for guidance and stated, on page 233, that the guidelines set by this Court are as follows:

"The rules by which this contention must be tested, as is shown by repeated decisions of this Court, are these:

1. The equal protection clause of the 14th Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is

done only when it is without any reasonable basis, and therefore is purely arbitrary.

2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.

3. When the classification in such a law is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assaults the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369, 377 (1911). See also, Al Means, Inc. v. City of Montgomery, 104 So.2d 816.

In the case of State v. Wadsworth, 505 P.2d 230, the Court stated:

"This court is not concerned with the wisdom of the (legislation) nor may we substitute our judgment for that of the legislature in its choice of method of enforcement * * *. Our inquiry is limited to the question of whether the Act contravenes the state and federal constitutions. Wisdom, necessity, propriety or experience of the Act are matters exclusively within the province of the legislature * * *. If the facts underlying * * * (Act) * * * are fairly debatable as the number of decisions of appellate courts attests, the judgment of the legislature prevails. * * *" Skaggs Drug Center, Inc. v. United States Time Corporation, 101 Ariz 392, 397, 398, 420 P.2d 177, 182, 183 (1966). (Additional citations omitted.)

A statute is clothed with the presumption of constitutionality and a legislative determination as to what is a sufficient distinction to warrant a classification will not be overthrown unless it is palpably arbitrary. Subsequent Injuries Fund v.

Industrial Accident Com'n., 310 P.2d 7; People v. Finston, 29 Cal.Rptr. 165; Victor Chemical Works v. Silver Bow Co., 301 P.2d 730.

In the Nevada case of Boyne v. State ex rel Dickerson, 80 Nev 160, 390 P.2d 225, the Court stated on page 227:

> "In view of the general rule that all presumptions are in favor of the validity of statutes and that a classification made by the Legislature will not be overthrown unless it is palpably unreasonable and arbitrary, I think, that any inquiry into the constitutionality of a statute should be approached with considerable trepidation.
>
> The equality guaranteed by the equal protection clause is equality under the same conditions and among persons similarly situated. The Legislature may make reasonable classifications with respect to persons, businesses, property and other activities but those classifications must not be arbitrary and must be based upon some difference in the classes having a substantial relation to the legitimate object to be accomplished."

In the more recent Nevada case of City of Las Vegas, Nevada v. Ackerman, 85 Nev 493, 457 P.2d 525, the Court stated on page 530:

> "As it was aptly stated by the trial court: 'It is not the function of the Court to question the wisdom of the public, but to determine whether or not they have lawfully enacted the measure in issue.' In Turner v. Fogg, 39 Nev 406, 159 P. 56 (1916), this Court quoted with approval the reasoning of the Pennsylvania Supreme Court: 'If it were our duty to make the law, no doubt some of its provisions would be written differently, but we cannot declare an act void because in some respects it may not meet the approval of our judgment, or because there may be difference of opinion as to its wisdom upon grounds of public policy. Questions of this character are for the Legislature, and not for the Courts.' "

In the 1973 case of Henry's Restaurants of Pomona, Inc. v. State Bd. of Equalization, App. 106 Cal.Rptr. 867, it was stated on page 871:

> "Neither due process nor equal protection imposes upon a state any rigid rule of the equality of taxation .... A legislature is not bound to tax every member of a class or none. It may make distinctions .... having a rational basis and .... they must be presumed to rest upon that basis if there is any conceivable state of facts which would support it." (Carmichael v. Southern Coal, 301 U.S. 495, at 509, 57 S.Ct. 868, 81 L.Ed. 1245; see also Stevens v. Watson, 16 Cal.App.3d 629, 94 Cal.Rptr. 190; People v. Herbert's of Los Angeles, 3 Cal.App.2d 482, 39 P.2d 829.)

II

The decision below confucts with the decisions of the Highest Courts of other states as to the proper application of the equal protection clause of the Fourteenth Amendment of the U.S. Constitution in relation to statutes which conditionally waive government immunity.

It must be pointed out that the right of suit against a governmental entity and the liability of said entity are two distinct things. In State of Arizona v. Stone, 443 P.2d 933, the Court of Appeals quoted from Stone v. Arizona Highway Commission, 93 Ariz 384, 381 P.2d 107 (1963), and stated:

> "However, the right to bring suit against the state and the liability of the state are two distinct things:
>
> > 'Immunity from an action is one thing; immunity from liability is another; hence the state does not waive its immunity from liability for the negligence of its agents, servants or employes by a statute con-

ferring jurisdiction only upon the court.' State v. Sharp, 21 Ariz 424, 428, 189 P. 631, 632 (1920).

Conversely, the abrogation of governmental immunity should have no effect, per se, upon the limitations placed upon the method and manner of bringing suit against the state. See 49 Am.Jr. States, Territories and Dependencies, Sec. 99, at 316; and 81 C.J.S. States Sec. 215(c) at 1310." (Emphasis added.)

And on page 935, the Court stated:

"In construing statutes, the overriding consideration always is the determination of the true legislative intent. Bushnell v. Superior Court, 102 Ariz 309, 428 P.2d 987 (1967). An important consideration in construing a statute is that the Court give some meaning to all of the language used in the statute, if this is possible. City of Mesa v. Killingsworth, 96 Ariz 290, 394 P.2d 410 (1964). . . . ."

The majority of jurisdictions direct that, as a condition precedent, compliance must be had with statutory provisions requiring a notice of a claim to be filed within a particular period of time before a cause of action can be filed against a governmental agency. The fundamental reasons why recovery for personal injuries against a municipal corporation should be barred was stated in the California Supreme Court in the case of Artukovich v. Astendorf (1942) 21 Cal.2d 329, 131 P.2d 831, revg on reh 125 P.2d 16, wherein the Court, in page 833 stated:

"The underlying principles upon which the authorities are based are (1) that neither the state nor any of its political subdivisions may be sued in the absence of specific statutory permission; (2) that where a right of action against the State or any of its political subdivisions is created by statute, such right may be circumscribed by any conditions that the Legislature may see fit to impose; and (3) that when the Legislature enacts a mandatory provision requiring in general terms that all claims must be presented before any action may be brought thereon, compliance

with such condition is an indispensable prerequisite to the bringing of any such action by any person regardless of his age or his physical or mental condition." (Emphasis added.)

The Supreme Court of the State of Tennessee in the case of Robinson v. Memphis (1937) 171 Tenn 471, 105 SW2d 101, upheld a judgment for the City of Memphis, stating, on page 102:

> ". . . It may be somewhat of a harsh rule to apply in some instances, to require a minor of tender years, and who may be, as alleged in this declaration, of such immature age and lack of mental capacity as to be unable to know or take cognizance of this requirement of the law; but the answer to this is that the statute has made no exception because of infancy or incapacity. That is a matter for the law-making body. It is the duty of the Court to enforce the law as it is made . . . ."

The right to sue a governmental subsidiary is principally on the ground that the right is created by statute and, therefore, the Legislature has the right to prescribe the conditions under which it may be exercised.

In the case of Johnson v. Fresno County (1944) 64 Cal. App.2d 576, 149 P.2d 38, it was contended by the Plaintiff that the statute involved which required ninety days in which to file a claim was arbitrary, capricious and unreasonable and deprived the Plaintiff of his right to remedy without due process of law. This was rejected by the Court since the right of action was created by statute, and since the statute placed a limitation of time in which the right was to be exercised, the right must be asserted within the time limited or it ceases to exist and could not be thereafter enforced.

It was held in Touhey v. Decatur (1911) 175 Ind 98, 93 NE 540, 32 LRA NS 350, 3 NCCA 390, that no violation of the Fourteenth Amendment or of the state constitution was involved in the holding that a claim against a municipality was barred because of failure to give notice within the sixty-day period

required by statute, even though the Plaintiff during the period in which the notice should have been given was physically and mentally unable to do so because of injuries received, the Court pointing out that, since the claim was a statutory one, the Legislature had the right to provide the conditions upon which an action could be maintained, without being open to constitutional objections.

Even in cases wherein infancy is involved, the majority of jurisdictions have ruled that lack of timely notice barred recovery for minors for injuries since, in the absence of legislative authorization, the notice requirement permits no exception.

The statutes NRS 244.245, 244.255 and 268.020 were passed by the Legislature of the State of Nevada to enable the state or political subdivision thereof to have reasonable notification of any and all claims that might possibly be filed against the particular entity. Prior to the enactment of these sections and the enactment of NRS 41.032 and 41.039, there was no right of action against a political entity, but having given up its governmental immunity, the state has set up a means whereby a claimant having a cause of action against the state or political subdivision thereof must, as a condition precedent, file a claim against the involved political subdivision. Again, in State v. Stone, supra, on page 935, the Court states:

> "Among the recognized purposes of a claims statute such as this is to permit the state to investigate the circumstances of claims against it, see C.J.S. States, Sec. 207(2), at 1276; and Olender v. State, 194 Misc. 583, 87 N.Y.S2d 578 (1949), and '* * * to establish an orderly procedure by which the legislature will be advised of claims in instances where no provision has been made for payment.' 45 Cal.Jur. 2d State of California Sec. 163, at 517-518. Purposes such as this are as well served by the investigation and planning for tort claims as in the case of those arising in contract or by statute."

Also the Alabama Supreme Court, in Grambs v. Birmingham (1919) 202 Ala 490, 80 So 874, stated on page 876:

". . . . When the claimant must needs resort to the Courts, he can only prevail against a diligent defense by alleging and proving that he has filed a statement according to the substantial requirements of the statute . . . . Some of the Courts have assumed to ingraft upon similar statutes provisos which permit waivers, but the weight of authority sustains our statement as to the law of the case . . . Most of the cases to the contrary are from Michigan, and we may note in connection with them that the statute of that state seems far from being as clear as ours in prescribing the filing of a statement or the serving of notice . . . , as a condition precedent to the bringing of suit . . ." (Emphasis added.)

Whenever a state or political subdivision thereof has a rational basis for classification, the question of the Fourteenth Amendment is not involved. To this effect, the case of DeFunis v. Odegaard, (Wash.) 507 P.2d 1169, states on page 1181:

"Generally, when reviewing a state-created classification alleged to be in violation of the equal protection clause of the Fourteenth Amendment, the question is whether the classification is reasonably related to a legitimate public purpose. And, in applying this "rational basis" test, (A) discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed. 393 (1961). See also, Securities Corp. v. Smith, 153 N.E.2d 806; Collins v. State Bd. of Social Welfare, 81 N.W.2d 4.

Although the case of Whitfield v. Roth, App. 107 Cal. Rptr. 207, involved a medical malpractice action, the Court states on page 210:

"In order to assert an action against a public entity a Plaintiff must plead and prove compliance with the applicable claims statute (Solis v. County of Contra Costa (1967) 251 Cal.App.2d 844, 846, 60 Cal.Rptr. 99). Failure to do so is "fatal to the cause of action" (Tietz v. Los Angeles Unified Sch. Dist. (1965) 238 Cal.App.2d 905,

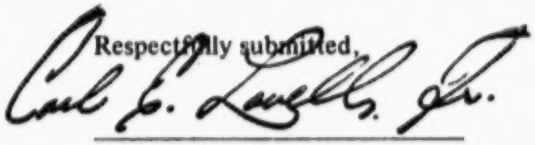
911, 48 Cal.Rptr. 245, 249). It has consistently been held that these claims requirements are applicable to minors, and that the time to file a claim is not tolled by reason of minority (Wozniak v. Peninsula Hospital (1969) 1 Cal.App. 3d 716, 723, 82 Cal.Rptr. 84; Van Alstyne, California Tort Liability Supplement (Cont.Ed.Bar, 1969), Sec. 8.6, pp. 91-92). And when the claimant is a minor, it is the parents' knowledge or lack of knowledge that is controlling in determining compliance with the claims requirement (Wozniak v. Peninsula Hospital, supra, at p. 723, 82 Cal. Rptr. 94)."

The only demand upon the law as it applies to due process or equal protection of the law is that said law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relationship to the object sought to be obtained. See, Barrick Realty, Inc. v. City of Gary, Ind., 354 F.Supp. 126 (1973); Nebbia v. People of State of New York, 291 U.S. 502, 525, 54 S.Ct. 505, 511, 78 L.Ed. 940 (1934), quoted and followed in United States v. Toledo, Peoria & Western Railroad Co., 280 F.Supp. 243 (N.D.Ind. 1968).

CONCLUSION

For the reasons and cases reflected above, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Nevada.

Respectfully submitted,



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APPENDIX

268.020 Demands, claims must be presented within 6 months.

1. All demands and accounts and all claims of whatsoever kind, character or nature, or however the same may have originated against any incorporated city in this state, must be presented to the city council of the city, in writing, within 6 months from time such demands or accounts became due or payable, and within 6 months from the time the acts from which the claims originated shall happen. Claims for property damage, personal injuries and any other claim arising out of a tort shall be certified by the claimant before presentation. No other claim or account need be certified. The certification required by this subsection shall be in substantially the following form: "I hereby certify that the above and foregoing claim against the City of ....., State of Nevada, is just and reasonable, and that the claim is now due, owing and unpaid."

2. No such demand, account or claim against any incorporated city in this state shall be audited, considered, allowed or paid by the city council or any officer or officers of the incorporated city unless the provision of subsection 1 shall have been strictly complied with.

3. No such demand, account or claim which has once been rejected shall ever again be considered or allowed by the same or any subsequently elected or appointed city council of the same city.